Supreme Court of the United States

OCTOBER TERM, 1957

No. 29

THE UNITED STATES,

Petitioner,

vs.

CENTRAL EUREKA MINING COMPANY (A CORPORATION), ALASKA-PACIFIC CONSOLIDATED MINING COMPANY, IDAHO MARYLAND MINES CORPORATION, HOMESTAKE MINING COMPANY, BALD MOUNTAIN MINING COMPANY, ERMONT MINES, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR RESPONDENTS

Appendices A, B, C and D are printed in a separate Volume

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OPINIONS BELOW

The original opinion of the Court of Claims (Judge LITTLETON) and the dissenting opinions of Judges JONES and LARAMORE (R. 11-62) are reported at 134 C. Cl. 1 and 138 F. Supp. 281. The Court's opinion (Judge LITTLETON) on the denial of the motion for a new trial (R. 142-147) is reported at 134 C. Cls. 130 and 146 F. Supp. 476.[1]

[1] The Court of Claims denied motions to dismiss three of the respondents' petitions on May 6, 1952 in *Idaho Maryland Mines Co.* v. *United States*, 122 C. Cls. 670; *Homestake Mining Co.* v. *United States*, 122 C. Cls. 690; and *Central Eureka Mining Co.* v. *United States*, 122 C. Cls. 691.

A petition filed by Oro Fino Consolidated Mines, Inc. had previously been dismissed on October 2, 1950 in *Oro Fino Consolidated Mines, Inc.* v. *United States*, 118 C. Cls. 18, cert. den. 341 U. S. 948 and the original petition filed by Alaska Pacific Consolidated Mining Company was dismissed on July 9, 1951, in *Alaska-Pacific Consolidated Mining Company* v. *United States*, 120 C. Cls. 307, on the authority of the *Oro Fino* decision.

JURISDICTION

This Court granted certiorari on January 14, 1957, 352 U. S. 964.

THE CONSTITUTIONAL PROVISION, STATUTES AND EXECUTIVE ORDERS.

The actions involve the taking of the property of the respondents under War Production Board Order L-208, which was issued on October 8, 1942 and is set out in the Findings of Fact of the Court below (R. 102-105) and as Appendix B hereto.

The Fifth Amendment to the Constitution provides in part:

> "* * * nor shall private property be taken for public use, without just compensation."

All the statutes which are relied upon with respect to the authority for Order L-208, whether by the petitioner or by the respondents in this brief, are set forth in full or in pertinent part in Appendix C.

The Executive Orders which are relevant in connection with the status, make-up and authority of the WPB are set forth in Appendix D.

The Special Jurisdictional Act of July 14, 1952 (66 Stat. 605) provides:

> "The United States Court of Claims be, and hereby is, given jurisdiction to hear, determine, and render judgment, notwithstanding any statute of limitations, laches, or lapse of time, on the claim of any owner or operator of a gold mine or gold placer operation for losses incurred allegedly because of the closing or curtailment or prevention of operations of such mine or placer operation as a result of the restrictions imposed by War Production Board Limitation Order L-208 during the effective life thereof: *Provid*[illegible] That actions on such claims shall be brought within one year from the date this Act becomes effective."

QUESTIONS PRESENTED

This case does not present the question stated in the petitioner's brief. The questions actually presented arise in this way:

By October 8, 1942 the Congress had conferred on the President very broad powers to take property, real or personal, which he thought it necessary or desirable to take in order to prosecute the War. Order L-208 was issued on October 8, 1942 by the WPB, an agency of the President and, as the Government's brief acknowledges, the Order was "approved by the President".

The Order categorically directed about 150 owners of gold mines or gold placer operations, which were classified as "nonessential", to "close down". It provided that any who failed to do so were subject to fine or imprisonment.

The sole purpose of the Order was to throw "hard-rock miners" out of work in the hope that they would seek and obtain employment in copper or other nonferrous metal mines which were producing critical materials. No other order was issued by the WPB for a similar purpose.

At the time, and throughout the War, there was no labor draft, so that it was impossible to require employees of nonessential industries to transfer to essential industries. In this one instance, the WPB decided to close down a nonessential industry, in the hope that it could "maneuver" some of the skilled labor into work which would contribute directly to the War effort. The WPB acted at the instance of the War Department and the Army (the Services of Supply) and the effect of its action was exactly the same as if the Army had taken over the respondents' mines, discharged the employees and closed down operations. Nothing at all like that was done to any other group of individuals or corporations during the War.

Order L-208 was dressed up with some of the conventional features of an order for the conservation and

allocation of critical materials, and with other features which superficially suggested that the Order was a critical materials order, but the camouflage was imperfect. The respondents sustained the burden of establishing that the only purpose of the Order was to close down the nonessential gold mines in the hope of maneuvering hardrock miners to the nonferrous metal mines. The Court of Claims so found and its Finding is supported by overwhelming evidence.

The Court of Claims found *as a fact* that Order L-208 was not an allocation order, as it purported to be. Indeed, the petitioner's brief concedes (p. 53) that the Court of Claims concluded that "L-208 was not devised for the purpose of conserving or allocating materials".

The provisions of the Order, referred to in the petitioner's statement of the question presented (p. 2), which "prohibited operators of nonessential gold mines from acquiring or using *any*[2] material, facility or equipment for mining purposes except the minimum amounts necessary for adequate maintenance" were not designed to conserve *critical* materials. As the Court below held, they merely implemented the directive that the nonessential mines close down, although they helped to give Order L-208 some superficial resemblance to an order relating to the conservation or allocation of critical materials.

Nor was the Order intended to prohibit the "sale or disposition of mining machinery and equipment without the permission of the War Production Board", as suggested in the petitioner's statement of the question presented (p. 2). Such prohibitions were only added to the Order by later amendments which were designed to deal routinely with a consequence of the closing of the mines, viz., the fact that some of the operators whose mines had been closed down might wish to sell some of the machinery and equip-

[2] Italics are supplied in this brief unless otherwise indicated.

ment which had been made idle. The two amendments of the Order were considered so unimportant by counsel for the petitioner in the Court of Claims that they were never called to the attention of that Court in any way and one is not even in the record. Nor were they adverted to in the petitioner's statement of the questions presented in the petition for certiorari; in its brief on the merits the petitioner revised the statement of the questions presented in the hope of opening the door to arguments based on the amendments (see below, p. 60-62).

The questions presented are these:

1. Whether a taking is effected when, during a period in which there is no statutory authority for the drafting or allocation of labor, an agency of the President issues an order that singles out a relatively small number of individuals and corporations who operate mines and directs them to close down, thus depriving them of their right to operate their mines, in the hope that their employees, thrown out of work, will seek and obtain other employment believed to be more useful.

2. Whether if an order which effects a taking is camouflaged, so that it has some superficial resemblance to an order for the conservation or allocation of critical materials, the Government can escape liability on that account.

3. Whether the Government can escape liability on the ground stated in the petitioner's Point II (p. 69), that "there was no intention, or authority, on the part of WPB to take respondents' property or business".

Only if the Court should conclude that there was not a compensable taking would it become necessary to consider a further question:

4. Did the Special Jurisdictional Act of July 14, 1952 establish liability to those who suffered losses as a result of Order L-208?

STATEMENT OF THE CASE.

If the facts of these cases were as indicated in the petitioner's brief they would probably never have been brought; if instituted, they would have been dismissed by the Court of Claims and this Court would never have granted certiorari.

The background, purpose, provisions and effects of Order L-208 are the subject of 52 Findings of Facts made by the Court of Claims which affect all of the six respondents (R. 62-111).

There are 88 additional Findings which relate to the six respondents respectively,[3] and 35 which relate to three plaintiffs below whose petitions were dismissed (R. 111-140).

The six respondents are all owners of gold mining operations which were closed down in compliance with Order L-208, and except for the Order could have operated until the Order was revoked on June 30, 1945 (Finding 73, R. 116; Finding 82, R. 117; Finding 104, R. 123) or for at least a part of that time.

The facts with respect to the dates when their operations were shut down, the disposition of appeals made by some of them, and the time when operations were resumed are set forth in the 88 Findings already mentioned.[4] All of such facts which are pertinent for present purposes are adequately set forth in the petitioner's brief (p. 11-13). To that extent the Statement in the petitioner's brief is fair and accurate.

The treatment in the petitioner's brief of the facts covered by the 52 general Findings of Fact (R. 62-111), and particularly the crucial ultimate Findings of Fact and the related portions of the Court's two opinions, is another matter.

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[3] The date of the revocation of Order L-208, June 30, 1945, is stated in Finding 90, which is in a group of findings relating to the respondent Central Eureka (R. 120).

[4] See table in footnote 72 at page 146 below.

The Findings of Fact made by the Court of Claims and the proceedings which led thereto.

The lower Court's 52 general Findings of Fact cover the background, purposes, provisions and effects of Order L-208 very fully. There are many detailed evidentiary or subsidiary findings; some of them give the entire text of documents or pertinent portions thereof; others set forth the Court's findings on matters with respect to which there was oral evidence.[5]

There are several ultimate Findings, such as

Finding 17, which concludes by saying that "By March 2, 1942 a series of progressively more stringent priority regulations had succeeded in virtually eliminating the potential acquisition by the gold mines of critical materials, supplies and equipment" (R. 75);

Finding 46, which relates to the real purpose of the Order (R. 105-106);

Finding 48, which relates to the inadaptability of the Order to serve as a critical materials measure (R. 106); and

Findings 47, 50 and 51, which relate to the ineffectiveness of the Order to bring about the transfer of a significant number of hardrock miners to the nonferrous metal mines (R. 106-107).

The Findings of the Court of Claims were the culmination of formidable legal proceedings in which the Court showed itself to be outstandingly fair-minded and thorough.

The Court of Claims was certainly not predisposed in favor of claims for compensation arising under Order L-208. In *Oro Fino Consolidated Mines, Inc.* v. *United*

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[5] For example, there is a long finding, No. 36, which relates to a five-hour meeting on October 1, 1942, seven days before L-208 was issued, at which representatives of the gold mines protested against the proposed Order and were told why it was going to be issued and what it was supposed to accomplish (R. 97-98).

States (1950) 118 C. Cls. 18, cert. den. 341 U. S. 948, it dismissed a petition which did not allege the facts pertaining to the Order that were later proved by these respondents, and the *Oro Fino* opinion leaves no doubt that the Court was prepared to indulge in every reasonable presumption in favor of the Government. When three of the respondents filed petitions containing detailed factual averments with respect to Order L-208, the motions to dismiss those petitions were denied, but the Court's opinion said that the petitioners (now respondents) would have "a most difficult burden" to sustain. *Idaho Maryland Mines Corp.* v. *United States*, (1952) 122 C. Cls. 670, 689.

There were hearings before a Commissioner lasting from November 19, 1952 to April 7, 1953, with 22 hearing days, 2100 pages of transcript and over 380 exhibits received in evidence. Detailed proposed Findings of Fact were submitted by both sides and extensive objections to the proposed Findings were also submitted to the Commissioner by both sides. On March 30, 1954 the Commissioner filed his Report (R. 1), which contains 132 findings and in its original print is 61 pages long.

Exceptions, briefs and reply briefs were filed in the Court of Claims. The exceptions, brief and reply brief of Homestake Mining Company, which had the laboring oar (R. 19-20), totaled 326 pages. The Government's exceptions and brief totaled 148 pages. There was an argument of about four hours before the Court of Claims on January 12-13, 1955 (R. 10).

The Court of Claims kept the case under advisement until February 20, 1956 when it handed down its opinion and Findings of Fact, which with short dissenting opinions of Chief Judge JONES and Judge LARAMORE take up 128 pages of the record.

A study of the Findings of Fact made by the Court of Claims, in the light of the Commissioner's Report, the objections thereto and the briefs, will reveal that the Court

of Claims was extraordinarly thorough and careful: it obviously considered all the objections to the Commissioner's Report; it made many changes in the Commissioner's findings; and it added several new findings.

While the petitioner's brief contains countless assertions which are at variance with the Findings of Fact of the Court of Claims, it fails to point out a single Finding of Fact which it contends is not supported by the evidence.

It is also significant that when the Government moved for a new trial, it did not base its motion on a contention that the Court had made any errors of fact (R. 142-147).

Despite all this, the petitioner's brief now disregards the Findings of Fact almost as completely as if this Court had the first and primary responsibility to determine the facts.

The respects in which the petitioner's brief fails to make a dependable statement of the facts.

In the petitioner's brief we find all of the following:

1. There is virtually no mention of the Findings of Fact of the Court of Claims.[6]

2. When an assertion is made on a point of fact and the record is cited, any one of a number of things may be found:

(i) the assertion may be consistent with a Finding of Fact and the citation may be to the Finding without mentioning that there is a Finding;

(ii) the assertion may be in direct conflict with a Finding of Fact and the citation may be to an item of evidence on which the petitioner relied unsuccessfully below;[7] or

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[6] Except for two references (p. 67, 68) to the last sentence of Finding 47 (R. 106), we have not found a single reference in the petitioner's brief to *any* Finding of Fact of the Court of Claims *as a finding*.

[7] For an example, see Appendix A hereto at pages 55-56.

(iii) the assertion may relate to some evidentiary or subsidiary matter on which no Finding was made and the citation may be to material in the record which does not tend to establish the correctness of the assertion.[8]

3. The brief takes an important Finding, changes the sense of the Finding by changing a word or words or omitting part of the Finding, and then incorporates the changed Finding as a statement of fact in the text without indicating its origin other than by a citation to a page of the record.[9]

4. The petitioner's Statement is presented as a summary (p. 5) of the narrative "History and Background of Limitation Order L-208" (Appendix A, p. 73-110). The petitioner's Appendix A reads as if it were a complete story and parts of it are based on Findings of Fact, but

(i) the substance of many important Findings favorable to the respondents is completely omitted;[10]

(ii) in quoting from documents which are incorporated in the Findings, the petitioner quotes insignificant parts which might be thought favorable to the petitioner and leaves out important parts which are clearly favorable to the respondents;[11] and

(iii) there are other respects, of the type already referred to, in which the narrative is not dependable.[12]

5. By organization of the material and other devices the petitioner has frequently attempted to suggest a relationship, a connection or a continuity where in fact there was none.[13]

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[8] For an example, see below at page 52.

[9] For examples, see Appendix A hereto at pages 4, 13-15 (three places) 24-25, 25-26, 35 and 72-73.

[10] For examples, see Appendix A hereto at pages 20, 21-22, 23-24, 24, 26-27, 30, 30-31, 47 and 85-86.

[11] For examples, see Appendix A hereto at pages 15-18.

[12] See Notes 7, 8 and 9 above.

[13] For examples, see Appendix A hereto at pages 3-4 and 7-8.

The Statement of Facts in Appendix A to this Brief.

We believe that this Court's review of the Findings of Fact of the Court of Claims will be limited (see below, p. 63-64). Nevertheless, in view of the course which the petitioner has followed it has seemed to us to be prudent to set forth in Appendix A hereto a detailed statement of the background, purpose, provisions and effects of Order L-208.

In the following summary statement of the facts we will refer to our Appendix A as well as to the Findings of Fact of the Court of Claims.

Summary Statement of the Facts.

The War Production Board (WPB) was an agency of the Executive Office of the President (Executive Order No. 9024, Appendix D, p. 8). Technically all authority was vested in the Chairman, who acted "with the advice and assistance of the members of the Board" (*id.*). Order L-208 was "agreed" upon by the Board (Finding 41, R. 101), so it may be looked upon as the action of the Board as well as of its Chairman, who was Donald M. Nelson (Finding 38, R. 99).

Controls of critical materials by the WPB, and the elimination of the acquisition of critical materials by nonessential gold mines.

One of the WPB's most important responsibilities related to the allocation of critical materials.

The acquisition of critical materials by gold mines which did not produce substantial amounts of other metals that were needed in the War effort (the "nonessential" mines) was restricted by a series of regulations or orders issued

by the WPB's predecessors (the OPM and the SPAB) and then by the WPB itself (Findings 3-17, R. 63-75).

By March 2, 1942, seven months before the issuance of Order L-208, the nonessential gold mines (Finding 17, R. 74-75):

> "* * * * were reduced to the same priority position as that of the least essential industries in the United States, i.e., they were entitled only to an A-10 preference rating[14] for the acquisition of maintenance, repair and operating supplies under Order P-100. They were excluded from obtaining any critical materials which might have been needed by any of the nonferrous metal mines or by any other industry deemed by WPB to be more essential. While it was possible for gold mines excluded from any benefits under P-56 to apply for equipment under the general repair order P-100, the demand for desired equipment was so far above available supply that the possibility of the gold mines obtaining any was remote. *Thus, by March 2, 1942, a series of progressively more stringent priority regulations had succeeded in virtually eliminating the potential acquisition by the gold mines of critical materials, supplies and equipment.*"

In the petition for certiorari, the petitioner informed the Court (p. 4-5):

> "Thus, by granting the lowest possible priority rating in a market where supplies were exceedingly scarce, *the War Production Board had effectively eliminated the possibility of acquisition by the gold mines of critical materials or supplies.*"

The WPB knew that any problem relating to the acquisition of critical materials by nonessential gold mines had been solved. The Court of Claims found (Finding 50, R. 106-107):

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[14] The lowest preference rating (Finding 10, R. 72-73).

*"On and prior to October 8, 1942, officials of WPB who were responsible for the issuance of L-208 knew (1) that existing priority orders insured that the gold mines would not receive any critical materials needed by more essential users; * * *"*

An attempt is now made in the petitioner's Statement (p. 5-8) and Appendix A (p. 73-91) to create the impression that when the WPB issued Order L-208 on October 8, 1942, it was still trying to control the acquisition of critical materials by the nonessential gold mines (Appendix A hereto, p. 7-8). It was not. That problem had been solved and the Court below so found. Further detail is given at pages 2-10 of Appendix A hereto.

Nonessential industries generally permitted to continue operations.

Nonessential businesses had difficulties in obtaining materials because of the allocation program and they had difficulties in keeping men because of Selective Service, but there was no program or policy of closing them down. On the contrary, their continuance was to some extent encouraged (Appendix A, p. 5). The objective was "to avoid unnecessary dislocations in the civilian economy" (Finding 10, R. 73).

Why the gold mines were "singled out": the purpose of Order L-208.

As the petitioner's brief says, the nonessential gold mines were "singled out" (p. 6, 8). This is the same expression which was used by General Somervell, Commanding General of the Services of Supply of the Army, in

explaining the purpose of Order L-208 shortly after it was issued (Appendix A, p. 33; Plaintiff's Exhibit 127, R. 520, 1510-1511).

The nonessential gold mines were singled out by a unique Order, that expressly and directly deprived the operators of the mines of the only beneficial use to which their mines could be put, kept them out of business for two and one-half years, scattered their employees, and disrupted their business organizations generally.

The reason why the nonessential gold mines were thus singled out was because there was a shortage of trained underground miners in the copper and other nonferrous metal mines (Finding 46, R. 105-106), and it was hoped that the closing of the mines would bring about the "transfer" of a significant number of "hardrock miners to the nonferrous metal mines" (Finding 51, R. 107).

In the petition for certiorari this Court was told that (p. 5):[15]

> "In the summer of 1942, the Labor Division of the War Production Board became concerned with the problem of an acute shortage of hardrock or underground miners in the vital non-ferrous copper mines. The primary reasons for this shortage were the draft, and the migration of workers out of the mine fields because of higher wages and better working conditions in other war industries. Accordingly, it was suggested to the War Production Board that, if the gold mines were closed, the unemployed miners would probably be diverted to copper mining, thereby alleviating a shortage which severely threatened the national war effort. In this connection, it was recognized that there was no authority to require the miners to transfer to industries in which their services were more urgently required; and further that the workers thus made available by the closing

[15] In quoting from the petition for certiorari we have omitted references to the pages of the Appendix to the petition which contained the Findings of the Court of Claims.

of the gold mines might very well go to work in the West Coast war plants instead of in the non-ferrous copper mines."

The shortage of miners in the nonferrous metal mines had become acute by July, 1942 (Finding 18, R. 75-76), and in that month the idea first developed of shutting down the gold mines in the hope that the miners, thrown out of work, would go to the nonferrous metal mines (Finding 19, R. 76).

On October 6, 1942, a formal decision was reached to issue an order directing that the operators of the non-essential gold mines "close down" their operations except for standby maintenance (Finding 41, R. 101; Finding 43, R. 102-104).

The Order was issued for only one purpose. As the Chairman of the WPB announced (Finding 45, R. 105; Plaintiff's Exhibit 34, R. 430, 1323), that purpose was "*to maneuver our manpower* so that less essential mining can be diverted to vitally important operations".

General Somervell, Commanding General of the Services of Supply of the Army, who attended the WPB meeting of October 6, 1942 at which Order L-208 was agreed upon and who told the WPB at that time that "failure to stop gold production immediately would be inexcusable" (Finding 41, R. 101), said in a letter written three days after L-208 was issued (Plaintiff's Exhibit 127, R. 520, 1510, 1511):

> "*The gold mining industry has been singled for curtailment only because it constitutes the most readily available pool of 'hard rock' miners who are so urgently needed to further the war effort.*"

The Court of Claims found that (Finding 46, R. 105-106):

> "The dominant consideration by Chairman Donald Nelson of WPB in the issuance of Limitation Order L-208 was the releasing of mine labor from the gold mines for employment in mines that

were producing other metals, such as copper, which were in short supply and urgently needed in the war program."

By "the dominant consideration" the Court of Claims meant the only real purpose (Appendix A, p. 34-39).

If there could be any question as to the meaning of Finding 46, resort could be had to the Court's opinion to clarify its meaning (see below, p. 64-65). The Court said in its opinion (R. 19):

> "The record establishes that no one having anything to do with the issuance of L-208 believed that it was devised or intended to be devised for the purpose of conserving critical materials, equipment or supplies, inasmuch as existing preference orders had solved that problem in connection with the gold mines.
>
> * * * * *
>
> "The record establishes that the purpose and intent of WPB in issuing L-208 was to deprive the gold mine owners and operators of the right to use their properties in the only way they could be beneficially used, i.e., to mine and sell gold for a profit, and that this was done in the unfounded hope that the underground workers thus deprived of their employment in the gold mines might seek employment in the nonferrous metal mines."

In effect, the petitioner's brief admits that the Court of Claims found that the only real purpose of Order L-208 was that given in Finding 46. For the brief says that the Court of Claims concluded that "L-208 was not devised for the purpose of conserving or allocating materials" (p. 53).[16]

Nevertheless, the petitioner's brief argues throughout

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[16] In this instance, as in others in the petitioner's brief (see, e.g., p. 52, 61), the word "materials" was obviously used to embrace materials, machinery and equipment (Appendix A hereto, p. 1-2).

that in fact Order L-208 was intended to "conserve scarce war materials" and "to divert mining machinery and equipment to essential wartime enterprises" as well as to bring about what the petitioner euphemistically calls "the voluntary relocation of manpower" (p. 2).[17] Indeed, in the petitioner's statement of the question presented, the manpower purpose is stated last of all (*id.*).

Moreover, the petitioner's statement of the manpower purpose of L-208 is decidedly different from the statement in Finding 46. Finding 46 is to the effect that the purpose was to release "mine labor from the gold mines for employment *in mines* that were producing other metals" (R. 105-106). The petitioner's statement implies that the manpower purpose was "to bring about the voluntary relocation of manpower to vital mining activities *and essential war work*" (p. 2), and the argument in the petitioner's brief assumes that the miners who would be discharged as a result of L-208 would go into "other essential war work" (p. 68-69). That assumption conflicts not only with Finding 46 but also with Finding 45 (R. 105) and the evidence that the WPB and the War Manpower Commission both sought to discourage the gold miners from obtaining employment in war industries other than nonferrous metal mines (Appendix A, p. 85-87). Furthermore, the contention now made that the WPB wanted to have the miners go into "essential war work" other than mining is not comprised in, and is inconsistent with, the statement of the questions presented which was made in the petition for certiorari (p. 2; see below, p. 60-62).

The petitioner's brief has "edited" Finding 46 by changing the words "*the* dominant consideration" to "*a* dominant consideration" (p. 11) and "*a* motivating factor"

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[17] Thus the petitioner now seeks to go behind the Findings of the Court of Claims, although in its petition for certiorari it appeared to be presenting the case to this Court on the basis of an acceptance of the Findings of the Court of Claims (see petition for certiorari, p. 3, and see below, p. 58-60).

(p. 60). In doing so, the petitioner has attempted to reinstate a finding of the Commissioner which the Court of Claims rejected (Appendix A hereto, p. 34).

At pages 34-39 of Appendix A we have discussed the purpose of Order L-208 in some detail, with particular reference to the Findings. The much longer prior section of Appendix A, under the heading **"The background and origin of the Order"** (p. 2-33) gives a narrative, taken principally from the Findings (and when not from the Findings, then from contemporaneous documents), which shows that the ultimate Finding of the Court of Claims, as to the purpose of L-208, is overwhelmingly supported by the record.

Indeed, if it were this Court's function to act as the trier of the facts, we are confident that it could reach only one conclusion: that there is no substantial evidence that the WPB had any purpose other than that stated by its Chairman, which was "to maneuver our manpower."

Controls over skilled labor; the taking of property "to maneuver manpower".

During World War II, both before and after the issuance of Order L-208, many unsuccessful attempts were made to secure the passage of legislation to provide for a labor draft (cf. R. 526).

The Austin-Wadsworth bill (S. 666, H. R. 1742, 78th Cong. 1st Sess.), which is referred to in Plaintiff's Exhibit 162 (R. 798, 1518-1519), was introduced in the Senate on February 8, 1943. At the preceding session of the Congress somewhat similar bills were introduced (see, e.g., S. 2788 and S. 2805) and there were hearings to which Senator Austin referred in supporting his bill (89 Cong. Rec. 666-671). The Austin-Wadsworth bill having failed of passage,

similar legislation was proposed in the 79th Congress (S. 36, S. 85, H. R. 1119, H. R. 1752).

Both before and after the closing down of the gold mines it was realized that the inability to draft labor made it difficult to "maneuver manpower", and that the results which could be obtained by shutting down a business and then trying to "maneuver manpower" were problematical.

On September 1, 1942, Chairman Donald M. Nelson of the WPB wrote to Senator McCarran of Nevada (Finding 24, R. 81):

> "We quite agree that no legal power exists today by which workers may be forced to transfer to other mines. This accentuates the mine labor problem which faces us today."

Many realized that if the nonessential gold mines were closed down, only a small percentage of the hardrock miners would go to the nonferrous metal mines (Appendix A, p. 73-83). The matter was put succinctly by Dr. Wilbur A. Nelson, the Chief of the Mining Branch of the WPB, in a memorandum on August 14, 1942 (Finding 22, R. 79):

> "I am sure that a gold miner, living in the excellent living conditions at Lead,[18] [South Dakota, where the Homestake Mine is located] is not going to leave his family and stop at Butte [Montana, where the Anaconda Copper Mines are located] if he could go to the West Coast."

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[18] The idea of maneuvering underground miners at the Homestake gold mine at Lead, South Dakota, to the Anaconda copper mine at Butte, Montana, over 500 miles away (Finding 69, R. 115), seems to have been at the fore in connection with L-208. The issuance of the Order was announced to the President of the Homestake Mining Company by the Under Secretary of War in a telegram which stated that the Under Secretary had directed immediate action to bring officials of the War Department and of the Anaconda Copper Mining Company in cooperation with the Homestake's local management at Lead (Appendix A, p. 32; Plaintiff's Exhibit 132, R. 613, 1516).

It was no easy thing to "maneuver" gold miners from Lead to nonferrous metal mines. The latter had "low wages, bad working and living conditions" (Finding 50, clause (5); R. 107), while at Lead (Finding 66, R. 114):

> "The working conditions at Homestake and the living conditions in the communities surrounding Homestake in 1942 were superior to those at the nonferrous metal mines to which the Government sought to transfer the Homestake miners. Homestake employees enjoyed free medical and hospital services, group insurance, pensions, recreational facilities, and many of the older miners owned their own homes. In 1942, approximately 440 of Homestake's employees had seen more than 21 years of service with the mine, and some had been employed there for more than 40 years. For these reasons, Homestake had enjoyed greater employment stability than the nonferrous metal mines despite the lure of higher pay in the war industries."

Many of the miners "were middle-aged men with families who owned their own homes and would not leave their communities if any alternative were possible" (Finding 50, clause (6); R. 107). This was pointed out to the WPB (Finding 23, R. 80).

Eight months after L-208 was issued, the Under Secretary of War wrote (Plaintiff's Exhibit 162, R. 798, 1518-1519):

> "The causes of the shortage of miners are well known. For one thing, men have left to take employment in industries that offer better wages. Again, they have left to go to farms, having been assured that no farmers will be drafted into the Army. These factors have caused a drift away from the mines, and conditions cannot improve so long as the drift continues. The furloughing of soldiers to work in the mines will not stop the drift. The difficulties that are inherent in the present situation will not be remedied until effective measures are adopted to keep men at occupations as essential as that of cop-

per mining and to recruit from less essential industries the additional men needed. The troubles in copper mining furnish a striking instance of the need of legislation along the lines of the Austin-Wadsworth bill."

There being no law like the Austin-Wadsworth bill, which would have made it possible to draft miners for the nonferrous metal mines, the WPB decided, at the instance of the War Department and the Army, to close down the nonessential gold mines, throw the hardrock miners out of work and try to persuade as many as possible to go to the nonferrous metal mines. That course imposed great hardships on the operators of the mines, on their employees and on their communities and it was not well designed to accomplish its purpose (Finding 50, R. 107), but it was determined upon nevertheless.

For the purposes of these cases, *it should be emphasized that the closing of the gold mines was not an incident of a general program for the assignment of manpower. It was a unique taking of property (the right to operate the mines) in the hope that as a consequence of the taking there would be a transfer of mine labor to the nonferrous metal mines.*

All nonessential industries lost employees during the War because of Selective Service: men were drafted or went into essential industries so that they would not be drafted. Doubtless a great many businesses found it difficult to continue operations as a consequence of their inability to retain enough employees or to obtain critical materials. But only the operators of the nonessential gold mines, about 150 in number, were singled out and directly and intentionally deprived of the right to make the only beneficial use which could be made of their properties, in the hope that some of their employees, who would be thrown out of work, might be induced to seek employment in the nonferrous metal mines.

The role of the War Department and the Army.

The idea of curtailing the production of gold by an order of the WPB "to free labor"[19] which was needed in the nonferrous metal mines originated, so far as the record indicates, in July 1942 with a committee organized by officials of the War Department (Finding 19, R. 76).

At that time there had been no study of (1) the number of hardrock miners who were employed in the gold mines and (2) the prospects of inducing a significant percentage of the hardrock miners to seek employment in the nonferrous metal mines.

Indeed, there was nothing approaching a careful effort to ascertain how many hardrock miners were involved until about a week before Order L-208 was issued on October 8, 1942 (Appendix A, p. 73-83). But as early as September 15, 1942, the "War Department was impatient at the delay" in issuing a close down order (Finding 30, R. 93; Appendix A, p. 20, 77).

By October 1, 1942, a decision had already been made, at least tentatively, to shut down the gold mines. On that day a meeting was held at the WPB which representatives of the gold mining industry were invited to attend (Find-

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[19] The euphemistic expressions to be found in the record and the Government's briefs are rather striking.

Order L-208 was designed to throw out of work "middle-aged men with families who own their own homes and would not leave their communities if any alternative were possible" and to maneuver them to "the nonferrous metal mines where wages were low and working and living conditions poor" (Finding 50, R. 107). Granted that the War made it important to have maximum production of nonferrous metals, it is still rather startling to have a committee organized by officials of the War Department refer to the program as one "to free labor" (Finding 19, R. 76) and to have the Government refer to the project as one for "the voluntary relocation of skilled manpower" (petition for certiorari, p. 2).

ing 36, R. 97). "At the opening of the meeting Mr. Batt [Vice Chairman of the WPB] stated that he had brought the gold mine operators to Washington to tell them that a decision had been made to close the gold mines in order to transfer the released labor to the copper mines" (Finding 36, R. 98). An extreme disagreement developed between the operators of the mines and the representative of the WPB's Labor Division as to the number of underground miners in the nonessential gold mines (*id.*). "Late in the meeting, Wilbur A. Nelson [Chief of the Mining Branch of the WPB] undertook to determine how many miners and muckers would actually be released by a closing order" (*id.*). But before this the representative of the Army had already spoken "strongly in support of a closing order" (*id.*).

As a result of what the Vice Chairman of the WPB learned at the October 1 meeting, he wrote to the Chairman suggesting further study and saying (Finding 38, R. 99):

> "Complete closing without exceptions will produce very serous economic dislocations, and the total possible gain in men is a small figure."

On October 3, 1942, the Vice Chairman received Dr. Wilbur A. Nelson's report that the proposed close down order "would make available only about 600 miners and muckers for other mining enterprises 'provided they [could] all be induced to go into other mines.'" (Finding 37, R. 98-99). It was known that the prospects were poor of inducing a large percentage of the 600 to go to the nonferrous metal mines "where wages were low and working and living conditions poor" (Finding 50, R. 107; Finding 51, R. 107). As already stated, many of the employees were "middle-aged men with families who owned their own homes and would not leave their communities if any alternative were possible" (Finding 50, R. 107).

Dr. Wilbur A. Nelson's figures were accepted by the War Manpower Commission and the WPB (Finding 41, R. 100-101).

But the War Department and the Army moved independently of Dr. Nelson's study and their momentum was not slowed down. On October 2 the Under Secretary of War wrote the Vice Chairman of the WPB a letter in which he said (Finding 39, R. 99):

> "The matter has hung fire for some time, and I trust that there will be no further delay."

In the same letter he offered to obtain the approval of the Navy Department.

On October 5 the Under Secretaries of War and the Navy sent the following memorandum to the Chairman of the WPB (Finding 40, R. 99-100), which the petitioner quotes (p. 101):

> "The case of gold mining presents sharply the question whether we mean business or not in doing everything possible to push war production.
>
> There are two thousand to three thousand hard-rock miners engaged in gold mining, now of no use in war production.[20] These men could help out substantially in relieving the labor shortage in copper mining. They will not help out in copper mining so long as gold mining is carried on.
>
> The present situation in production of copper, due to shortage in the supply of miners, is so alarming that the Army is about to furlough soldiers to go back to work on mining of copper. This is a hard step for the Army to take. But the effect of this step

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[20] As already noted, it had previously been determined that a shutdown of the gold mines "would make available only about 600 miners and muckers for other mining enterprises 'provided they [could] all be induced to go into other mines'" (R. 99). No explanation has been given of the origin of the Under Secretaries' statement that there were "two thousand to three thousand hard-rock miners engaged in gold mining".

and others will not give complete relief if nothing is done to transfer gold miners to copper mining.

The matter has hung fire for some time. We deem it of the utmost importance that prompt action be taken and that half measures be avoided."

On the next day, October 6, 1942, a WPB meeting was held at which the formal decision to issue Order L-208 was reached (Finding 41, p. 100-101). At that meeting General Somervell, who was the Commanding General of the Services of Supply of the Army, made a statement which appears in the minutes immediately before the note of the action which was agreed upon (Finding 41, R. 101):

> "*General Somervell stated that* because of the critical shortage of copper, which is drastically curtailing ammunition production, the Army has taken the unusual precedent of furloughing 4,000 soldiers to work in the copper mines and that, under these conditions, *failure to stop gold production immediately would be inexcusable.*"

The action of the WPB in issuing Order L-208 was announced to the President of the respondent Homestake Mining Company by the Under Secretary of War, not by the WPB (Appendix A, p. 32, Plaintiff's Exhibit 132, R. 613, 1516).

The part played by the Army was reviewed in the opinion of the Court below (R. 17-18). Among other things, the Court said (R. 18):

> "Army officials were furnished with facts and figures showing that few hardrock miners would be released by the closing of the gold mines and that there was no way of compelling those miners to work in the copper mines and little likelihood that they would do so. Despite this, officials of the Army continued to bring great pressure to bear on the War Production Board to close down the gold mines, indicating

that otherwise WPB would not be doing its part to increase production in the nonferrous metal mines."

The petitioner's brief twice points out that L-208 was issued "with the approval and at the urging of the War Department" (p. 21, 55).

No one reading the narrative at pages 2-33 of Appendix A hereto, particularly pages 25-33, can escape the conclusion that the War Department and the Army provided the driving force which led to the issuance of the Order.

For all practical purposes, it is as though the Army physically took over the respondents' mines and kept them idle until June 30, 1945.

The close down: Order L-208.

The decision agreed upon at the WPB meeting of October 6, 1942 was this (Finding 41, R. 101):

> "An order shall be issued by the War Production Board stopping all nonessential domestic gold mining operations within 60 days and thereafter permitting only minimum maintenance to keep mines dewatered and in standby condition."

Order L-208, which was issued on October 8, 1942 (Finding 43, R. 102-105), is set forth in Appendix B hereto.

Order L-208 defined nonessential mines as including all lode or placer operations which did not produce substantial amounts of critical materials (Finding 43, R. 102; Finding 17, R. 74).

The key provisions of the Order were paragraph (b)(1) (R. 102):

> "(1) On and after the issuance date of this order, each operator of a nonessential mine shall immediately take all steps as may be necessary to

close down, and shall close down, in the shortest possible time, the operations of such mine."

and paragraph (i), which read in part (R. 104):

> "(i) *Violations.* Any person who wilfully violates any provision of this order, or who, in connection with this order, wilfully conceals a material fact or furnishes false information to any department or agency of the United States, is guilty of a crime, and upon conviction may be punished by fine or imprisonment."

Paragraph (b)(1) contained a specific directive "to close down". It represented an assumption of complete dominion and control over the mining operations—not in order to continue them, but in order to close them down, except for "minimum maintenance to keep mines dewatered and in standby condition" (Finding 41, R. 101; par. (b)(3) of L-208, Finding 43, R. 102-103).

Other provisions of L-208 are referred to below. The core of the Order was paragraph (b)(1). As the Court below held (R. 44-45):

> "The real substance and intent of the order was embodied in the prohibition directed at the continued operation of the gold mines."

Approval by the President.

As the petitioner's brief says twice (p. 21, 55), L-208 was "approved by the President". Twenty-one United States Senators from twelve gold-producing states sent the President a letter on October 10, 1942, two days after the Order was issued, in which they protested against the Order and requested a stay "at least until the whole subject of marshalling of manpower and the allocation of labor may be considered", but their protest and request were rejected (see below, p. 121; Appendix A hereto, p. 31-32).

Order L-208 unique.

Boldly disregarding the lower Court's Findings, the petitioner's brief attempts to liken L-208 to other "L" orders and reaches a climax with the astounding assertion that "L-208 was a typical exercise of the allocation authority of WPB" (p. 22).

In the part of the brief which attempts to frighten the Court by suggestions of "an incalculable and staggering financial burden" (p. 42), the brief refers to 25 "L" orders that stopped or curtailed the manufacture of various end products which required critical materials and says that such orders were similar to L-208.

Actually, L-208 was unique, and the Committees of the Judiciary of the House and Senate were correct when they said (see below, p. 40-42, 49):

> "No similar order was issued against any other segment of American industry."

"L" orders of the type cited by the petitioner are the subject of several paragraphs in Finding 3, which is not mentioned in the petitioner's brief (R. 63-64). Two of those paragraphs are quoted in Appendix A hereto (p. 4).

The "L" orders referred to by the petitioner were utterly different from L-208.

First, their true purpose was to conserve critical materials, not to "maneuver manpower".

Second, they merely stopped or curtailed the manufacture of end products which required the use of critical materials in significant amounts. No critical materials went into the end product of the gold mines, refined gold. This was pointed out by the Court below (R. 32).

Third, the "L" orders cited by the petitioner did not undertake to require a business to close down. The Court of Claims found (Finding 3, R. 63):

> "In most instances a prohibition against the production of a product resulted in the facilities being transferred to war production. Thus, the automobile industry's facilities were largely converted to war purposes although some of the facilities may have become inoperative because of a lack of adaptability to other purposes or to war production."

If any manufacturer of end products which required the use of critical materials was put out of business because of inability to obtain critical materials, that manufacturer suffered one of the consequences of a proper regulation of critical materials which were essential to the War effort. But the WPB did not issue orders relating to passenger automobiles, stoves, refrigerators and the like for the purpose of keeping the manufacturers from using their plants. On the other hand, Order L-208 directly and intentionally kept the operators of the nonessential gold mines from making any use of their mines so that as a consequence most of their hardrock miners would be thrown on the labor market.

The targets of the "L" orders to which the petitioner refers were critical materials. The targets of L-208 were the respondents' mining operations, which required hardrock miners.

The holding of the Court of Claims that Order L-208 was in fact not an allocation order.

As Judge LARAMORE said in his dissent, the majority opinion below "points out that L-208 was not an allocation order, as it purported to be, but rather was clearly an order closing gold mines deemed nonessential to the war effort" (R. 61). In this connection, the majority opinion shows that the Court's Findings of Fact constituted a holding *as a matter of fact* that L-208 "was not an allocation order" (see below, p. 95-97).

The camouflouge of Order L-208.

The Argument in the petitioner's brief under the subheading "*Purpose*" (p. 58-61) stresses the preamble to L-208, which read as follows (R. 102):

> "The fulfillment of requirements for the defense of the United States has created *a shortage in the supply of critical materials* for defense, for private account and for export *which are used in the maintenance and operation of gold mines;* and the following order is deemed necessary and appropriate in the public interest and to promote the national defense."

The implication in the preamble that L-208 was issued because of the shortage of critical materials "which are used in the maintenance and operation of gold mines" was not in accordance with the facts as found by the Court of Claims and as established by the overwhelming weight of the evidence. The WPB knew that the problem of critical materials had been solved, so far as the gold mines were concerned, seven months before (see above, p. 11-13). The preamble was camouflage.

On September 15, 1942, Mr. Morris Creditor, Special Assistant to the Chairman of the WPB, wrote to the Chairman about the preamble of a draft of the Order which was under discussion at the time (Finding 31, R. 94-95). That draft of the Order did not contain the "close down" direction which was in Order L-208 as issued, but the preamble of the draft order was identical with that of Order L-208. (Defendant's Exhibit 46, R. 962, 1594, 1595-6.) Mr. Creditor said (R. 95):

> "Actually, only a small amount of critical materials is used in gold mining. Hence, if it is contemplated to issue the order in its present form, *the preamble should state the real reason; which is to direct this labor to more necessary industries.*"

This forthright recommendation was not adopted.

The citations of the authority for the Order at its foot were also camouflage (R. 104-105). They would have been suitable if L-208 had been a true priorities regulation, intended to serve the purpose stated in the preamble.

Paragraphs (b)(2) and (b)(3) prohibited the acquisition, consumption, or use of "*any* material, facility, or equipment" in any of the mining operations to which they respectively related (R. 102-103).

Chief Judge JONES said that paragraphs (b)(2) and (b)(3) "forbade the use of *critical* materials in nonessential industry," that "they would have produced the closing down of the mines whether or not paragraph (b)(1) had been included" and that paragraph (b)(1) should "be construed as mere surplusage" (R. 58-59). But the Chief Judge misread the Order and disregarded its purpose.

Paragraphs (b)(2) and (b)(3) did not relate to "*critical* materials". The references therein were to "*any* material, facility, or equipment", whether needed in the war effort or not. The prohibitions of the acquisition, consumption or use of "*any* material, facility, or equipment" in any of the several mining activities mentioned in (b)(2) and (b)(3) were obviously adopted as a device to make L-208 superficially similar to an order relating to the acquisition, consumption and use of critical materials. However, the fact is that the Order contained no mention of critical materials except in the preamble.

In the light of the direction in paragraph (b)(1) that the affected gold mines "close down", nothing whatever was added to Order L-208 by the provisions in paragraphs (b)(2) and (b)(3) prohibiting the consumption, acquisition or use of "*any* material, facility, or equipment" in the conduct of the operations of the mines thus ordered to be closed down. The only significance of the provisions of paragraphs (b)(2) and (b)(3) lay in the 7-day and 60-day deadlines imposed by their terms on the mining activities

therein specified which would have required the continued use of mine labor.[21]

To say that paragraph (b)(1), which directed the close down, was surplusage seems almost to be like saying that if a man is sentenced to be hung by the neck until dead and then to be buried in the prison burying ground, the direction that he be hung by the neck until dead can be disregarded as surplusage since the burying would result in his death in any event.

The Court below said in its opinion (R. 44-45):

> "The real substance and intent of the order was embodied in the prohibition directed at the continued operation of the gold mines. The so-called limitation on the gold mine owners' use of the equipment and supplies and facilities which they owned was not intended to make those items available to the Government or to the war effort but was expressly included in the order to insure that they would not be used in the mining of gold, and was part and parcel of the express order to cease doing business."

The Court of Claims did not find, in so many words, that L-208 was camouflaged, but its Findings were in substance to that effect. The Court's opinions point up the only conclusion which can be drawn from the Findings.

In the original opinion the Court said (R. 19):

> "The record establishes that *no one having anything to do with the issuance of L-208 believed that it was devised or intended to be devised for the purpose of conserving critical materials, equipment or*

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[21] Paragraph (c), which was not mentioned by Chief Judge JONES, related to the application of preference ratings "to acquire *any* material or equipment for consumption or use in the operation, maintenance, or repair of a nonessential mine" (R. 103). That provision of the Order was clearly surplusage since the gold mines had already been denied access to critical materials (Finding 17, R. 74-75; Finding 50, R. 106-107).

supplies, inasmuch as existing preference orders had solved that problem in connection with the gold mines.

* * * * *

"The record establishes that *the purpose and intent of WPB in issuing L-208 was to deprive the gold mine owners and operators of the right to use their properties in the only way they could be beneficially used, i.e., to mine and sell gold for a profit, and that this was done in the unfounded hope that the underground workers thus deprived of their employment in the gold mines might seek employment in the nonferrous metal mines.*"

And at R. 40-41:

"*Despite its preamble and the authority cited for its issuance, the language of the order itself and the circumstances surrounding its issuance indicate that neither its purpose nor its effect was to conserve or allocate critical materials, equipment and facilities needed for defense,* but was rather to deprive the gold mine owners of their right to make profitable use of their gold mines."

Furthermore, in denying the motion for a rehearing the Court below restated its original holdings (R. 145):

"The court held that *what WPB said it was doing and what it in fact and law did, were two different things and that the Government could not escape the obligation of paying just compensation for what it had the authority to take and in fact took, simply by calling its action of taking a 'priorities order' or an 'allocation order'.*"

In saying that L-208 was camouflaged, we have no intention of impugning the motives of those of the men who were responsible for it. We heartily subscribe to the petitioner's references to them as "responsible men, selflessly dedicated to winning the war in the shortest possible time" (p. 55; see below, p. 48). However, that does not alter

the inescapable fact, confirmed by the Court of Claims, that Order L-208 *was* camouflaged. And the petitioner has tried throughout its brief to make the camouflage successful.

A fuller analysis of the provisions of the Order will be found in Appendix A (p. 40-45).

Order L-208 not adapted to serve as a priorities or allocation order relating to critical materials.

Since L-208 was not intended to serve as a priorities or allocation order relating to critical materials, it is not surprising to find that it was not adapted to serve, and did not serve, as such.

At pages 45-68 of Appendix A we have set forth in detail (1) the reasons why Order L-208 was not adapted to serve as a priorities or allocation order relating to critical materials and (2) the Findings and evidence that it did not accomplish anything significant in that field.

The portion of the Appendix which we have mentioned considers both (i) acquisitions of critical materials, machinery or equipment by the gold mines and (ii) the movement of critical materials, machinery or equipment from the gold mines.

As to acquisitions of critical materials, machinery or equipment by the gold mines (Appendix A, p. 46-48), it is enough to say that potential acquisitions of critical materials, machinery or equipment by the nonessential mines had already been "effectively eliminated" seven months before L-208 was issued—to quote from the petition for certiorari (p. 5; see above, p. 12, and Appendix A hereto, p. 6-10).

As to the movement of critical materials, machinery or equipment from the gold mines (Appendix A hereto, p.

46-48). The outstanding fact is that the Government did not requisition, or issue mandatory orders for, any critical materials, machinery or equipment owned by the gold mines which were closed down.

However, the petitioner has complicated matters by reversing the position which it took in the petition for certiorari. It now relies heavily on Priorities Regulation 13, which was issued by the WPB on July 7, 1942, and on two amendments of Order L-208 which were adopted on November 19, 1942 and August 31, 1943, and asserts that the Court below made several "demonstrably inaccurate" statements to the effect that if any of the operators of the closed gold mines wished to sell critical materials, machinery or equipment, they could sell them to whomever they pleased (p. 50).

In no less than *twelve places* the petitioner's brief refers *specifically* to Priorities Regulation 13 or one or both of the two amendments of L-208 and its presentation of the alleged facts and its argument are dependent in countless other places upon what it assumes about the Regulation and the amendments.

As we have shown at pages 58-65 of Appendix A hereto.

First: In the Defendant's Exceptions and Brief in the Court of Claims, filed November 5, 1954, comprising 148 pages, there was no reference to Priorities Regulation 13 or to either of the two amendments of Order L-208, and none of them was mentioned on the oral argument below. None of them was *ever* called to the attention of the Court of Claims in any way.

Second: Only one, the amendment of November 19, 1942, is in the record.

Third: Although the petitioner made a motion for a new trial in the Court of Claims, it made no reference to the lower Court's alleged errors of fact to which it now gives such prominence.

Fourth: The questions now raised about Priorities Regulation 13 and the two amendments of Order L-208

were not referred to in the petition for certiorari or fairly comprised therein (see below, p. 60).

Fifth: At least one of the petitioner's references to Priorities Regulation 13 is seriously incorrect, and all are incomplete. Priorities Regulation 13 did not apply to "machinery or equipment" at all. There is a complete lack of evidence as to the extent, if any, that Priorities Regulation 13 restricted sales by the gold mines after October 8, 1942 of things other than machinery or equipment.

Sixth: What the Court of Claims said about Order L-208, as issued, was clearly correct.

Seventh: The amendments of Order L-208 which were adopted on November 19, 1942 and August 31, 1943, did not change the character of the Order as issued on October 8, 1942. They undertook to deal routinely with a consequence of the closure of the gold mines which had been brought about by the Order. They simply provided that if operators of closed mines *wished to sell* machinery or equipment to which the two amendments related, respectively, they had to sell them pursuant to WPB authority.

Undoubtedly the reason why no point was made in the Court of Claims of Priorities Regulation 13 and the two amendments of Order L-208 is that the able and experienced counsel who represented the Government in the Court below considered them of no importance.

The amendments of November 19, 1942 and August 31, 1943 were afterthoughts, in the sense that they dealt routinely with consequences of the closing of the non-essential mines. The petitioner's reliance on the amendments is also an afterthought, in the sense that during more than four years of litigation the petitioner never referred to them, in brief or on argument or in its petition for certiorari.

The fundamental fact is that it was not the purpose of Order L-208 to try to channel critical material or used machinery or equipment from the gold mines to other mines.

The record discussed in Appendix A at pages 54-58 establishes conclusively that any movement of machinery or equipment to more essential industries as a result of L-208 was incidental and haphazard. While there is not enough in the record to make even an intelligent guess as to the amount of machinery and equipment which moved to the nonferrous metal mines because of Order L-208, such data as there are indicate that the amount was probably very small.

The practical failure of L-208 to maneuver hardrock miners to the nonferrous metal mines.

The practical effects of L-208 as a manpower measure were stated succinctly and accurately in *the petition for certiorari, which said that the problem involved a "shortage of hardrock or underground miners in the vital nonferrous copper mines"* (p. 5) and that as a result of the Order *"only an insignificant number of hardrock miners actually transferred to the copper mines"* (p. 6).

However, the petitioner's brief on the merits now asserts that "the success or failure of L-208, as an instrument for the diversion of manpower, remains a debatable question" (p. 65), and it suggests that the question does not pertain to hardrock miners but to all employees and that the WPB wished to divert them to "esential war work" (p. 65-69). The presentation of this subject in the petitioner's brief is truly remarkable.

The Findings and the record establish that (1) the shortage was of hardrock miners and (2) the purpose of L-208 was to divert hardrock miners to the nonferrous metal mines. The shortage was not of mining company employees of all sorts (including employees on the surface) and it was not the purpose of L-208 to divert mining company labor of all sorts to essential industries other than

nonferrous metal mines. These subjects are covered in detail at pages 68-92 of Appendix A hereto.

We have already quoted Finding 46 which sets forth the purpose of L-208 (p. 15-16).

Finding 51 reads (R. 107):

> "It is reasonable to conclude that in issuing L-208 WPB acted without any justifiable anticipation that the order would bring about the transfer of more than an insignificant number of hardrock miners to the nonferrous metal mines."

Finding 18 sets forth the reasons for the shortage of hardrock miners in the nonferrous metal mines (R. 75):

> "The reasons for the poor production of nonferrous metals were found to be (1) the out-migration of workers in the nonferrous mines to other war industries offering higher wages and better working conditions, (2) drafting of the workers for the armed services by Selective Service, (3) excessive labor turnover within the industry, (4) low morale of the workers, (5) the short workweek in the mines, and (6) the lack of an organized and effective program of recruitment of workers for this industry."

Obviously Order L-208 did not deal with any of these causes of the shortage.

The Court of Claims found (Finding 50, R. 106-107).[22]

> "On and prior to October 8, 1942, officials of WPB who were responsible for the issuance of L-208 knew * * * (2) that the closing of the gold mines would release only a small number of hardrock miners and helpers; (3) that no agency of the Government had the power to compel these men to accept employment in the nonferrous metal mines; (4) that in all likelihood unemployed gold miners would accept employment in shipbuilding, aircraft

[22] The omitted portions of this Finding relate to other subjects and are quoted elsewhere.

and construction industries rather than go to work in the nonferrous metal mines where wages were low and working and living conditions poor; (5) that L-208 was not in fact directed at the known reasons for the shortage of underground workers in the nonferrous metal mines, i.e., low wages, bad working and living conditions, and the refusal of Selective Service to defer miners; (6) that a substantial number of the employees of the gold mines were middle-aged men with families who owned their own homes and would not leave their communities if any alternative were possible; • • •"

As to the results, the Court below found (Finding 47, R. 106):

"47. The closing of the gold mines did very little to relieve the manpower shortage in the nonferrous metal mines because (1) a relatively small number of the type of workers needed in those mines, i.e., hardrock miners, were released (finding 37); (2) a number of these men were required to remain in the gold mines to keep them in safe condition; (3) the older and more settled experienced miners remained in their home communities doing what they could to make a living or remaining idle; (4) most of the younger hardrock miners released sought employment in the better paying war industries, construction projects, or were drafted in the armed services. *Approximately 100 hardrock miners are known to have gone to work in the nonferrous metal mines and to have remained there for a year.*"

We reserve for consideration in the Argument (see below, p. 103-105) the suggestion in the petitioner's brief that it is irrelevant whether or not L-208 failed of its purpose (p. 65).

The Congressional findings with respect to Order L-208.

Shortly after the opinion of the Court of Claims was handed down in *Idaho Maryland Mines Corporation* v. *United States*, 122 C. Cls. 670, denying the Government's motion to dismiss the petitions of three of the respondents, the Senate Committee on the Judiciary reported favorably on a bill (S. 3195, 82nd Cong., 2nd Sess.) relating to claims for losses incurred because of the shutdown of the gold mines under Order L-208 (Plaintiff's Exhibit 178, R. 855, 1559-1572). An identical favorable report was made by the House Committee on the Judiciary, and on July 14, 1952, the bill, a Special Jurisdictional Act, became law (66 Stat. 605). The Act is quoted at page 2 above.

The Reports of the two Committees are significant.

After a statement of the "purpose of the proposed legislation" (which is merely a repetition of the language of the Act itself), the Reports said in part (Senate Report No. 1605, House Report No. 2220, 82nd Cong., 2nd Sess.; Plaintiff's Exhibit 178, R. 855, 1559-1560):

"Statement

"On October 8, 1942, the War Production Board issued order L-208 which summarily closed the gold mines in this country. The order was rescinded on July 1, 1945, having been in effect approximately 2½ years.

"The records of the War Production Board show that the gold mining industry was selected as a guinea pig to test the policy of shutting down so-called nonessential industries during the war. The issuance of the order was based upon dubious if not nonexistent authority. The order failed completely to make any substantial contribution to the war effort and inflicted ruinous costs on the gold mining

industry. No similar order was issued against any other industry in the Nation during the war years."

The Reports contained extensive quotations from the Report of a Subcommittee of the House Committee on War Claims, on H. R. 4393, 79th Congress (R. 1561-1570).[23] By doing so the two Committees indicated their agreement with unequivocal statements to the effect that compensation should be paid to those who suffered as a result of the issuance of Order L-208.

Significant statements in the Report of the Subcommittee of the House Committee on War Claims which were quoted by the two Committees in May and June of 1952 include the following (R. 1561-1562, 1570):

> "Your committee believes that this order inflicted a sacrifice on the gold-mining industry which the Federal Government in common fairness should try to relieve.
>
> • • • • •
>
> "It is clear, in the opinion of your committee, which opinion is supported by expert testimony and is uncontroverted by Government witnesses, that there was little or no basis for issuing Order L-208, and that it was not only an administrative error but that the War Production Board proceeded on dubious authority. *The conclusion further has been reached that the order should have provided a mechanism for*

[23] H. R. 4393, 79th Congress, provided that the Secretary of the Treasury should be authorized to determine the validity of claims of operators of gold mines closed down by Order L-208 and to reimburse a gold mine operator for the "financial loss due to the closing or curtailment of operations of such mine • • • but not including payment for lost production". Hearings on H.R. 4393 were held by the Subcommittee of the House Committee on War Claims in December, 1945 and in February and March, 1946 and the Subcommittee unanimously rendered a favorable Report on July 19, 1946 to the full Committee on War Claims. The Report of the Subcommittee is referred to in Plaintiff's Exhibit 175 (R. 846, 1524, 1525-1534), as well as in Plaintiff's Exhibit 178, from which we have quoted above. H.R. 4393 was never reported out by the Committee on War Claims so that it never reached the floor.

> *compensation and that, as such was not provided, the Congress should so provide, even while realizing that much of the loss and damage is irreparable.* Your committee believes that the prompt repayment of such losses as are covered in the pending bill, H. R. 4393, will not only do substantial justice to an industry which was selected for a unique experiment, but will greatly aid in reestablishing an important industry, provide thousands of jobs to veterans and start a flow of taxes into county, State, and the Federal treasuries."

After the quotations from the earlier Subcommittee Report, the Senate and House Committees each stated its own conclusions as follows (R. 1570):

> "The committee has carefully studied the facts relating to the situation that arose as a result of the proclamation of the War Production Board Limitation Order L-208 and is convinced that the gold mining industry was dealt with in a fashion which *merits the consideration of the court in the adjudication of the losses which may have been occasioned by this order.* The Idaho Maryland Mines Corp. decision is ample evidence of the fact that the least that can be done is to allow those persons affected by Order L-208 their day in court for such recompense as may seem justified. * * *"

SUMMARY OF ARGUMENT

The judgment of the Court of Claims is based on Findings of Fact which are supported by abundant evidence. In the petition for certiorari the Government did not indicate any intention to challenge the adequacy of the Findings or the support therefor and this Court's review of the Findings would in any event be limited.

Yet the presentation in the Government's brief on the merits is consistently and fundamentally in conflict with the Findings of Fact. The brief does not even indicate what Findings were made, to say nothing of specifying

what Findings the petitioner challenges or the basis of any challenge. The arguments on matters of law are predicated on the petitioner's assumptions or assertions on points of fact, not on the facts as found by the Court of Claims. If the parts of the brief which are dependent upon an acceptance of the petitioner's factual assumptions and assertions were to be deleted, the brief would be in shreds.

* * * * *

Because of the petitioner's reliance on its version of the facts, rather than on the Findings, and because it has materially modified the statement in the petition for certiorari of the questions presented, the case is very different from the one which this Court must have thought was presented by the petition for certiorari.

* * * * *

On October 8, 1942 the WPB, an agency of the President, issued Order L-208, which directed the owners of about 150 gold mines and gold placer operations to "close down" in the shortest possible time. It provided that any violation was punishable by fine or imprisonment.

All of the respondents owned gold mines which were in operation on October 8, 1942, which were shut down in compliance with the Order and which remained shut down until the revocation of the Order on June 30, 1945.

The key paragraph of the Order was a peremptory and explicit direction to "close down" mining operations except for standby maintenance. It constituted an exercise of complete dominion and control over the respondents' mines.

The Order effected a direct taking of the respondents' property, viz., their right to produce and sell gold from their mines. That right was itself property. Only that right made the mines of any value or in any way useful.

It is immaterial that the Government did not take physical possession of the mines or operate them itself. The deprivation suffered by the respondents of the right

to use their mines constituted a taking. "The question is what has the owner lost, not what has the taker gained." Moreover, the Government got what it wanted.

The respondents' gold mines were closed down by the WPB in the hope that the hardrock miners employed in the mines would seek and obtain other employment in copper and other nonferrous metal mines where there was a labor shortage.

The Order was unique. Admittedly gold mining was not essential, but it was not the policy to try to close down nonessential industries; they were permitted to continue and to some extent helped to do so. The operators of the gold mines were "singled out" so that the hardrock miners would be discharged and thrown on the labor market. No other segment of any industry was similarly treated in World War II, or at any other time in our history.

The WPB camouflaged the Order so that it had some superficial resemblance to an order for the allocation of critical materials. The preamble to the Order referred only to critical materials; subordinate paragraphs of the Order mentioned materials; and the Order closed with a citation of Executive Orders and a statute which related to critical materials. No reference was made in the Order to its real purpose. But the camouflage of the Order did not hide the all-important first directive, that "each operator of a nonessential mine shall immediately take all steps as may be necessary to close down, and shall close down, in the shortest possible time the operation of such mine." And the Findings below, abundantly supported by the record, establish that the purpose of that directive was to "maneuver" miners, not to conserve critical materials, and that the Order was *in fact* "not an allocation order".

St. Regis Paper Co. v. *United States* (1948) 110 C. Cls. 271, cert. den. 335 U. S. 815, frequently cited in the peti-

tioner's brief, has no application for the reason, among others, that the closing down of the gold mines by Order L-208 was the direct, intended effect of the Order—not, as in *St. Regis*, the consequential result of an order which in fact dealt with the allocation of critical materials.

Since Order L-208 was not intended as an allocation order, it was naturally not adapted to serve as one. As the Court below found, the "existing priority orders insured that the gold mines would not receive any critical materials needed by more essential users", so that the Order was wholly unnecessary to keep the owners of gold mines from acquiring critical materials. Nor was the Order intended or effective to make critical materials or used equipment or machinery owned by the gold mines available for use by more essential industries.

The notion of closing the gold mines to relieve the shortage of miners in the nonferrous metal mines was advanced as early as July, 1942 with almost incredibly confused assertions about the number of miners in the gold mines and the total number of all employees of the mining companies. Shortly before the decision was made to issue Order L-208, the Chief of the Mining Branch of the WPB was directed to ascertain the facts, and he reported that the Order would make available only about 600 miners and muckers if they all could be persuaded to go into the nonferrous mines. There were reasons, well known to the WPB, why only a small percentage of the 600 could be expected to go to the nonferrous mines. Hence the Court of Claims found that the WPB had no reason to anticipate that the Order would bring about a transfer of a significant number of hardrock miners to the nonferrous metal mines.

The issuance of the Order by the WPB was all the more extraordinary because the minutes of the meeting at which the decision was made to issue the Order show that the WPB actually accepted the figures just summarized but issued the Order nevertheless. The explanation is that the

WPB acted at the instance of the War Department and the Army which, clinging to incorrect figures, told the Board that it was "of the utmost importance that prompt action be taken and that half measures be avoided", and that "failure to stop gold production immediately would be inexcusable".

As a manpower measure, the Order proved a failure.

Everything said above is supported by Findings of Fact made by the Court of Claims, which were supplemented by statements in the opinion of the Court. Of the two Judges who dissented, Judge LARAMORE agreed with the majority as to the purpose of Order L-208 and, so far as appears from his opinion, on all the other points referred to above except the President's authority to close the mines.

Long prior to the decision of the Court below, the Committees on the Judiciary of the Senate and the House had concluded that Order L-208 "completely failed to accomplish its purpose, or any purpose whatever, and inflicted irreparable and unjustifiable loss on the gold-mining industry".

The basic issue is whether, when an agency of the Chief Executive with his approval has taken dominion and control of the property of a relatively small number of individuals and corporations, so as to close down their operations and throw their skilled employees out of work in the hope that the skilled labor can be "maneuvered" into more essential industries, the Government can escape its obligation to pay compensation for the taking by camouflaging the taking order with a preamble and citations relating to critical materials. As the Court below said, "what the WPB said it was doing and what in fact and law it did, were two different things". If an agency of the President dresses up a taking order which ought to provide for compensation in an effort to make it appear to be a non-compensable regulation of critical materials, can the Government escape liability?

The issue should not be confused by the circumstance that Order L-208 related to gold mining. The mining of gold was not a noxious activity, subject to suppression as such. Indeed, both before and after the issuance of Order L-208 critical materials, machinery and equipment subject to allocation and control by the WPB were shipped in substantial quantities to South Africa, Canada, Honduras, Nicaragua and Colombia, for use in gold mining which continued in those countries throughout the War.

After the judgment of the Court of Claims was handed down against the Government, the latter made a motion for a new trial and took the position for the first time that it lacked the authority to take the respondents' property. This Court's decision in *International Paper Co.* v. *United States* (1931) 282 U. S. 399, 406, calls for a summary rejection of such a belated repudiation of responsibility.

It is immaterial whether or not power to take the respondents' property was formally delegated by the President to the WPB. The WPB was an agency of the President and, as the petitioner's brief twice concedes, the Order was approved by the President.

The statutory authority of the President to take the respondents' property is clear. Furthermore, by the Special Jurisdictional Act of July 14, 1952, Congress waived any question as to the authority for the Order.

* * * * *

While the Court below did not find it necessary to pass on the point, the Special Jurisdictional Act went further. The Act acknowledged liability to each gold mine owner who could establish that it incurred losses because it was prevented by Order L-208 from producing and selling gold and thus made it unnecessary to prove a taking.

ARGUMENT

I

THE RESPONDENTS' CLAIMS ARE JUST, AND THEIR RIGHTS UNDER THE CONSTITUTION SHOULD NOT BE OBSCURED BY SPECIOUS OR IRRELEVANT SUGGESTIONS.

The petitioner's brief disregards the Findings of Fact of the Court of Claims and, instead of considering whether on the facts as found there was a compensable taking of the respondents' property, the brief advances sundry specious or irrelevant suggestions about the respondents' claims. We will dispose of those suggestions first.

The War leaders.

It is, of course, agreed that those who authorized Order L-208, including the President, were, as the petitioner says (p. 55), "responsible men, selflessly dedicated to winning the war in the shortest possible time." But it is not necessary to argue in this Court that the consequences of the actions of officials and agencies of the Government are determined by the Constitution and are not affected by admiration or regard for individuals who are involved. In *Ex parte Milligan* (1866) 4 Wall. 2, this Court's opinion, holding that military commissions created by Lincoln were unconstitutional, was written by Justice David Davis, who had been one of Lincoln's closest friends and was the Administrator of his estate. Justice Davis' enduring respect and affection for Lincoln did not prevent him from announcing the principle that (p. 120-121):

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."

The suggestion that the respondents are unpatriotic.

The petitioner's brief contains what appears to be a thinly veiled suggestion that these respondents and others who have similar claims against the Government[24] are unpatriotic because they do not "accept in the spirit of patriotism the hardships, inconveniences, and economic sacrifices required by present day warfare" (p. 43).

The respondents do not seek to profit from the War. They do not ask for compensation measured by values enhanced because of the War. They ask only that they not be required to sustain, without compensation, a unique deprivation which was imposed upon them by the WPB at the instance of the Army.

Order L-208, unique.

The effect of Order L-208 was to deprive about 150 individuals and corporations of the right to the beneficial use of their mines or placer operations until June 30, 1945.

The Congressional Committee Reports said (Plaintiffs' Exhibit 178, R. 855, 1559, 1562):

> "No similar order was issued against any other segment of American industry."

That statement was correct. Order L-208 was radically and fundamentally different from other "L" orders to which the petitioner attempts to liken it (see above, p. 28-29).

The petitioner says that "to single out the gold industry for full compensation would be an even grosser discrimination" (p. 43). The respondents were singled out by an Order which imposed a unique deprivation. Compensation required by the Constitution for a unique injury cannot be called discriminatory (see above, p. 28-29; Appendix A, p. 2-5).

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[24] Said to number 150 in all (p. 5, Note 3; p. 40).

The language of this Court in *Monongahela Navigation Co.* v. *United States* (1893) 148 U. S. 312, is pertinent. In speaking of the right to compensation where property is taken, the Court said (at p. 325):

> "It in no wise detracts from the power of the public to take whatever may be necessary for its uses; while, on the other hand, it prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him."

The Government's *in terrorem* arguments.

In the prosecution of World War II the Government required private property worth many billions of dollars. It got that property by the constitutional method of paying for what it needed.

The petitioner's brief says that there are approximately 150 claims like those of the respondents, with "an aggregate value estimated to exceed forty millions of dollars" (p. 40). Certainly that number of claims, with that total liability, should not give this Court pause if, as the Committees of the Congress said, Order L-208 "inflicted a sacrifice on the gold-mining industry which the Federal Government in common fairness should try to relieve" (R. 1562).

The Committees also observed that "the great majority of the mine operators affected by the order were the small operators" (R. 1561).

* * * * *

Not limiting itself to the 150 claimants, the petitioner warns against the "staggering financial burden" and discrimination which would result from the application of a rigid constitutional doctrine in these cases (p. 40-44). That argument *in terrorem* should receive short shrift. It rests

on the false premise that Order L-208 was similar to other "L" Orders. It was unique (see above, p. 28-29).

World War II ended more than 12 years ago. *St. Regis Paper Co.* v. *United States* (1948) 110 C. Cls. 271, cert. den. 335 U. S. 815, disposed of any question about claims for the indirect results of proper "L" Orders (see below, p. 87-89). If it had not, the statute of limitations would bar such claims.

The respondents' claims are not for compensation for the indirect results of a proper "L" Order. They are claims for compensation for a direct taking of their property through an Order which was not properly an "L" Order at all.

The petitioner's singular attack on gold mining in the United States and its defense of gold mining in Honduras and other foreign countries.

The petitioner's brief contains sundry rather remarkable comments about gold and gold mining, in this country and abroad.

Later herein (p. 89-95) we answer the contentions made by the petitioner which seem to be based on the premise that gold mining is "noxious". But some general observations are in order at this point.

It is not disputed that the respondents' gold mining operations were "nonessential". However, that was at least equally true of innumerable other operations which were carried on during the war and to some extent encouraged (see above, p. 13). And it would be absurd to say that the respondents' operations or the product of those operations, refined gold, were noxious. Neither the operations nor their product were in any way similar to those which have been treated as noxious by valid Congressional or state legislation.

On the other hand, the contributions made by gold mining should not be minimized. As we show in more detail later (p. 93-95), the Findings set forth that:

(1) The respondents provided splendid working and living conditions for their employees.

(2) The operations supported the communities where they were located. In particular, two communities in South Dakota with total populations of 16,000 were totally dependent on the mine of one of the respondents.

(3) The respondents paid substantial taxes to the states in which their operations were conducted and to the Federal Government.

The petitioner's brief says (p. 8):

> "The gold industry was singled out for particularly restrictive treatment because gold was not of importance to the war effort, yet its production consumed material in short supply, badly needed by essential nonferrous metal mines (R. 69)."

The nonessential gold mines could not be justly "singled out", for a taking without compensation, simply because their product was "not of importance to the war effort". That was true of countless other products (see above, p. 13).

The assertion that they were singled out because the production of gold "consumed material in short supply, badly needed by essential nonferrous metal mines" is refuted by the Findings, as well as by the record (see above, p. 11-13; see below, p. 95-97). That was the *pretext* for L-208 as set forth in the preamble; it was not the real reason. The petitioner's citation to the record is one of many examples that can be found in the petitioner's brief of citations which do not afford the slightest support for assertions which are made in the petitioner's brief.[25]

While gold mining was shut down in the United States (including Alaska), it was encouraged by the WPB in several foreign countries (Finding 49, R. 106):

[25] The petitioner's citation (R. 69) is to a memorandum written in ***December, 1941.*** The problem of the acquisition of critical materials by the gold mines was solved by ***March 2, 1942*** (see above, p. 11-13), and Order L-208 was not issued until ***October 8, 1942.***

> "Prior to the issuance of L-208, and afterwards until the end of the war, critical materials, machinery and equipment subject to allocation and control by WPB were shipped in substantial quantities to foreign countries for use in their gold mining industry. These countries included South Africa, Canada, Honduras, Nicaraugua and Columbia, in all of which gold mines continued to operate throughout the war."

At the October 6, 1942 meeting of the WPB, at which Order L-208 was agreed upon, there was discussion of gold mining in South Africa, Honduras and Canada (Finding 41, R. 100-101). Two sentences from the minutes of that meeting, dealing respectively with an area in this country and with Honduras, are especially interesting:

> "Lead and Deadwood, South Dakota, with aggregate populations of 16,000 are *totally* dependent on the mine's operations."
>
> * * * * *
>
> "The basic industries of Honduras are the cultivation of bananas, of which exportation to the United States has been reduced to 20 percent of normal, and gold mining."

We have no wish to raise any issue about the shipments of critical materials, machinery and supplies to Honduras and other foreign countries. But the petitioner's brief is notably silent about the devastating effects of L-208 in the United States and Alaska, at a time when gold mining was being supported in Honduras.

The justice of the respondents' claims.

The principal theme of the petitioner's brief is that the respondents' claims are unjust.

The outstanding fact about these cases is that the tribunals, legislative and judicial, which have had the responsibility of ascertaining the facts and the time to do

so, have come to the unqualified conclusion that a failure to compensate the operators of the nonessential gold mines would be most unjust.

* * * * * * *

The Senate and House Committees on the Judiciary both adopted in 1952 the conclusion which had been reached in 1946 by the Subcommittee of the House Committee on War Claims, after full hearings,[26] that Order L-208 "inflicted ruinous costs on the gold mining industry"—a "sacrifice on the gold-mining industry which the Federal Government in common fairness should try to relieve" (see above, p. 40-42).

The reference in the petitioner's brief to the Judiciary Committee of the Senate is one of the many remarkable features of the brief. After saying that the respondents "belittle the constructive accomplishments of L-208", the brief adds (p. 65) "The gold mining industry as a whole, as could be expected, concurs in this view (R. 1547) as do *the political representatives of gold mining states* (R. 1524-1534)." At the cited place in the record the Court will find a Report of the *Judiciary Committee of the Senate* issued on February 22, 1949 to accompany S. 45 of the 81st Congress 1st Session.[27] The Senate Judiciary Committee Report, much of which was later incorporated in the 1952 Committee Reports from which we quoted in our statement of the case (see above, p. 40-42), said, among other things:

> "The conclusion further has been reached that the order should have provided a mechanism for compensation and that, as such was not provided, the Congress should so provide, even while realizing that much of the loss and damage is irreparable."

The Chairman of the Committee on the Judiciary was Senator McCarran of Nevada. It is nonetheless remarkable

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[26] See above, p. 28, Note 3.

[27] S. 45 did not pass.

for the petitioner's brief to refer (p. 65) to the *entire* Senate Committee as "the political representatives of gold mining states".

* * * * *

The petitioner's brief says that the Court of Claims made "a particularly myopic appraisal of the results of L-208" (p. 53). But the brief fails to set forth what the Court found or to give anything even remotely approaching a fair summary of the bases for its Findings. And the record leaves no doubt that the Court of Claims reached its conclusions after a most thorough and fair-minded analysis of the evidence and the arguments.

As we have shown above (p. 7-9), the history of the claims under L-208 establishes that the Court of Claims was prepared to indulge every reasonable presumption in favor of the Government.

After the facts had been proved and the cases had been argued before the Court of Claims, the Court decided that the respondents had sustained what it had described as "a most difficult burden" *and it is evident from the Court's opinion that the majority was profoundly impressed that the respondents' claims are just.*

The comparison with other War losses and other suffering.

In many places the petitioner's brief develops the theme that the losses sustained by the respondents under Order L-208 were inevitable war losses for which no compensation should be awarded. But we submit that there is no rule of law or justice which requires or permits an indiscriminate grouping of all war losses as inevitable and not compensable.

Those who sustained monetary losses or suffered personally in the War as a result of price ceilings, the freezing of wages or the draft shared their parts of common burdens imposed by regulatory systems which were deemed

necessary to win the War. Those regulatory systems were administered with a view to their several objectives, as fairly as could be expected and without discrimination.

If a man who was entitled to Selective Service exemption was denied that exemption, it was no answer to say to him that other men had been inducted into the Service.

It was and is part of our Constitutional system that if property be taken by the Government, in war or in peace, just compensation must be paid. If land is taken for an army camp, if a ship is taken for the transportation of ammunition or food, or if any other property is taken for any other war purpose, the owner is entitled to compensation.

Indeed, in many instances where property is taken during a war, the compensation allowed will be the greater because of factors for which the war is responsible. Nothing of that kind is involved here because the War did not result in any increase of the price of gold.

The respondents' mines were not shut down as a consequence of the application of a general regulatory system for the control of critical materials. Their mines were "singled out" for one reason only: because the Government wanted to have those particular mines stand idle in the hope that hardrock miners employed in them would go to the nonferrous metal mines.

The guiding principle.

We believe that the applicable principle was stated by Mr. Justice Douglas, dissenting, with the concurrence of Mr. Justice Black, in *United States* v. *Caltex (Philippines) Inc., et al.* (1952) 344 U. S. 149, 156,[28] which involved the destruction by the Army of the respondents' terminal facilities in Manila at the time of the Japanese attack on Pearl Harbor, in order to keep them from falling into the hands of the enemy:

[28] Cited in the petitioner's brief at pages 18, 30-31.

> "It seems to me that the guiding principle should be this: Whenever the Government determines that one person's property—whatever it may be—is essential to the war effort and appropriates it for the common good, the public purse, rather than the individual, should bear the loss."

Of course, we do not contend that this statement in a dissenting opinion is binding on the Court, but we think that it is consistent with this Court's holdings over the years. The decision of the majority in *Caltex* rested on the ground that the destruction during a war of property which is about to fall into the hands of an enemy is analogous to the destruction of property to prevent the spread of a fire or of a contagious disease. *Caltex* did not establish any general proposition that the Government may destroy or otherwise take property during a war and escape liability for compensation on the broad ground that war entails sacrifices. On the contrary, *Caltex* represents an exception to the general rule that compensation must be paid if property be taken, an exception based upon the fact that the Caltex property in Manila was about to fall into the hands of the Japanese.

Order L-208 singled out a limited number of corporations and individuals who were thousands of miles from any theatre of operations and directly deprived them, for a period of 2½ years, of their right to produce and sell gold. Their mines were useless for any other purpose. No other property owners were similarly deprived of their property right to make any beneficial use of what they owned. The respondents have as just a claim for the taking of their property as any other citizen whose property was taken during the War.

II

BY DISREGARDING ESSENTIAL FINDINGS OF FACT OF THE COURT OF CLAIMS AND IN OTHER RESPECTS THE PETITIONER IS SEEKING TO RAISE QUESTIONS WHICH WERE NOT SET FORTH IN THE PETITION FOR CERTIORARI OR FAIRLY COMPRISED THEREIN.

IN ANY EVENT, THE SCOPE OF THIS COURT'S REVIEW OF JUDGMENTS OF THE COURT OF CLAIMS IS A LIMITED ONE.

THIS COURT MAY RESORT TO THE OPINION OF THE COURT OF CLAIMS, IF NECESSARY, FOR CLARIFICATION OF ANY FINDINGS.

As we have set forth at pages 6-7 above, the Court of Claims made very full Findings of Fact, covering the background, purpose, provisions and effects of Order L-208. The Court's judgment and Findings of Fact followed a vigorously contested litigation over a period of years.

The petitioner's brief presents the case virtually as if the Court of Claims had made no Findings at all. The *only* mentions of *any* Finding of Fact which we have located are two references at pages 67 and 68 to the last sentence of Finding 47 (R. 106). Innumerable assertions are made which are in direct conflict with explicit Findings; subjects which were disposed of by Findings are treated as if they were completely open; and Findings are "edited" so that their sense is changed and then used "without credit" (see above, p. 9-10).

The petitioner's brief, taken as an entirety, is an attack on all of the ultimate Findings, although it is not presented as such.

By disregarding essential Findings of Fact of the Court of Claims and in other respects the petitioner is seeking to raise questions which were not set forth in the petition for certiorari or fairly comprised therein.

Rule 23 of the Rules of this Court provides:

> "1. The petition for writ of certiorari shall contain in the order here indicated—
>
> * * * * *

> "(c) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the petition or fairly comprised therein will be considered by the court."

See *General Talking Pictures Corp.* v. *Western Electric Co.* (1938) 304 U. S. 175, 177-178.

In the petition for certiorari, the petitioner prefaced its Statement by saying (p. 3):

> "The pertinent facts *as found by the Court of Claims* may be summarized as follows:"

All references to the record were to the Findings of Fact of the Court of Claims.

The statement of the facts which followed gave no hint that the petitioner intended to present the case in this Court as if the Court were the original trier of the facts and as if the petitioner's only obligation were to present such facts, suppositions and theories as it thinks may be helpful to its defense.[29]

The basic questions now presented by the petitioner's brief necessarily relate to the adequacy of the Findings of the Court of Claims and the support in the record therefor. Unless the petitioner challenges the Findings there was no occasion for it to make the kind of presentation which it has made.

Questions as to the adequacy of the Findings of Fact of the Court of Claims and the support therefor in the record

[29] The petition did imply, in its statement of the questions presented, that L-208 was issued in "order to conserve scarce war materials" as well as "to bring about the voluntary relocation of manpower to vital mining activities" (p. 2), but it did not otherwise suggest any disagreement with the Findings of Fact of the Court of Claims.

were not "set forth in the petition or fairly comprised therein."

* * * * *

The statement of the questions presented in the petition for certiorari (p. 2-3) and the statement of the question presented in the brief on the merits (p. 2-3) are significantly different. The differences will be found in the opening paragraphs.

1. The brief on the merits states that one of the purposes of L-208 was "*to divert mining machinery and equipment to essential wartime enterprises*" and that "as amended" the order "prohibited the sale or disposition of mining machinery and equipment without the permission of the War Production Board" (p. 2). Everything which we have just quoted is new. On the other hand, the brief omits this sentence which was in the petition for certiorari (p. 2):

> "The Order contained no provision for routing the scarce war materials held by the mine owners to the more urgent users of such materials."

The purpose of the changes made by the brief on the merits is to try to pave the way for the petitioner's arguments about the two amendments of L-208 which were adopted on November 19, 1942 and August 31, 1943 (see above, p. 35-36, and Appendix A hereto, p. 58-65). No argument based thereon had *ever* been made previously (id.).

The petitioner's arguments about the two amendments clearly present a question which was not "fairly comprised" within the petition for certiorari.

2. The Government in its brief on the merits now says that Order L-208 was issued "to bring about the voluntary relocation of manpower to vital mining activities *and essential war work*" (p. 2). The words we have italicized are new; the other words quoted were in the statement of the "Questions Presented" in the petition for certiorari.

Having thus attempted to open the door to a new point that Order L-208 was intended "to bring about the volun-

tary relocation of manpower to * * * essential war work" *other than mining*, the petitioner's brief argues that the WPB was motivated by "the expectation that a sizable number of laborers released by a further restriction of the gold mining industry would be diverted to the nonferrous metal mines *as well as other essential industries*" (p. 8-9), and bases part of its argument on this latter point (p. 68-69; see Appendix A hereto, p. 86-87).

This new contention conflicts with the Findings of Fact of the Court of Claims (Appendix A, p. 33-39) and with the record (Appendix A, p. 70-73, 86-87).

* * * * *

The differences between the single question which the petitioner now presents (p. 2-3) and the two questions which were stated in the petition for certiorari (p. 2) may be summarized as follows:

The petitioner's brief now argues (p. 58-61) that Order L-208 had four purposes, which are mentioned in the statement of the "Question Presented" (p. 2).

(1) "to conserve scarce war materials",

(2) "to divert mining machinery and equipment to essential wartime enterprises",

(3) "to bring about the voluntary relocation of manpower to vital mining activities", and

(4) "to bring about the voluntary relocation of manpower to * * * essential war work".

Of these four alleged purposes, the petition for certiorari referred only to (1) and (3).

Alleged purpose (2), involving "mining machinery and equipment", was brought into the case in the petitioner's brief with Priorities Regulation No. 13 and two amendments of Order L-208, none of which was mentioned in the Court below or adverted to in the petition for certiorari (see above, p. 35-36, 60; Appendix A, p. 58-68).

Alleged purpose (4) was also not referred to in the

petition for certiorari; it was brought in at the last minute, in the teeth of the Findings of the Court of Claims and the record (see above, p. 17, 60-61; Appendix A, p. 33-39, 70-73, 86-87).

The preamble to the Order (R. 102) which the petitioner quotes (p. 58) mentioned only alleged purpose (1). The implication in the preamble was definite that the Order was "deemed necessary and appropriate in the public interest and to promote the national defense" because of "*a shortage in the supply of critical materials* for defense, for private account and for export, *which are used in the maintenance and operation of gold mines*".

The Court of Claims found that the only real purpose of the Order was (3), viz., to try to bring about what the petitioner calls "the voluntary relocation of manpower to vital mining activities" — in other words, to use the contemporaneous expression of the purpose, to maneuver hard-rock miners to the nonferrous metal mines (see above, p. 13-18; Appendix A, p. 34-39).

After introducing contentions relating to two new alleged purposes of Order L-208 and thus blurring the sharp issue, which was stated in the petition for certiorari, as to the purpose of the Order—an issue decided as a matter of fact by the Court of Claims in favor of the respondents (see above, p. 13-18; below, p. 95-97)—the petitioner's brief ranges over the whole record, and into the fields of speculation and imagination, in an effort to retry these cases on the facts in this Court, with reference to all four of the alleged purposes of the Order and substantially without regard to the Findings of the Court below.

Indeed, as a consequence of the introduction of the two new alleged purposes of Order L-208, the range of the petitioner's assertions and arguments on matters of alleged fact is much broader than the factual presentation which the petitioner made before the Commissioner or the Court of Claims.

In any event, the scope of this Court's review of judgments of the Court of Claims is limited.

The scope of this Court's review of judgments of the Court of Claims is set forth in Note 4 to the opinion in *United States* v. *Penn Foundry & Manufacturing Co., Inc.* (1949) 337 U. S. 198, 207-208. As a convenience, we set forth that Note in full just as it appears, without any quotations except those in the Note itself. Except as indicated in our Note 30, the emphasis was supplied by the writer of the opinion, Mr. Justice BURTON:

> The scope of our review of judgments of the Court of Claims is a limited one. The early practice and rules are discussed in *Luckenbach S. S. Co.* v. *United States*, 272 U. S. 533, 536-540. At the time of all the proceedings in the Court of Claims in the instant case, the authority of this Court to review causes upon petition for a writ of certiorari was set forth expressly in the Act of February 13, 1925, c. 229, 43 Stat. 939, § 3 (b), as amended by the Act of May 22, 1939, c. 140, 53 Stat. 752, which became 28 U. S. C. § 288 (b). It provided:
>
> "(b) In any case in the Court of Claims, . . . it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause be certified to it for review and determination of all errors assigned, with the same power and authority, and with like effect, as if the cause had been brought there by appeal. In such event, the Court of Claims shall include in the papers certified by it the findings of fact, the conclusions of law, and the judgment or decree, as well as such other parts of the record as are material to the errors assigned, to be settled by the Court.
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> • • • • •
>
> "In such cases the Supreme Court shall have authority to review, in addition to other questions of law,

errors assigned to the effect *that there is a lack of substantial evidence to sustain a finding of fact;*[30] *that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that there is a failure to make any finding of fact on a material issue.*" (Emphasis supplied.)

The foregoing expressly controlled the practice until repealed by the new Judicial Code, effective September 1, 1948. The new Code, 28 U. S. C. § 1255, said merely:

"Cases in the Court of Claims may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted on petition of the United States or the claimant; . . ."

The Reviser's Notes to that Section said:

"Provisions for authority to review, in addition to other questions of law, 'errors assigned to lack of evidence to sustain a finding of facts; that an ultimate finding or findings are not sustained by findings of evidentiary or primary facts; or that there is a failure to make a finding of fact on a material issue,' *were omitted as unnecessary.*" (Emphasis supplied.) H. R. Rep. No. 308, 80th Cong., 1st Sess. A107 (1947).

This Court may resort to the opinion of the Court of Claims, if necessary for clarification of any Findings.

In *United States* v. *Wells* (1931) 283 U. S. 102 this Court said (p. 120-121, footnotes omitted):

"It is evident that the court did not consider the statements in its opinion, which we have quoted, as

[30] The words "that there is a lack of substantial evidence to sustain a finding of fact" were not italicized by the Court at 338 U. S. 207.

additional findings of fact, but as an argument with respect to the conclusion to be drawn from its findings. *In its opinion, the court was summarizing what it considered to be the effect of its findings, and no useful purpose would be served in returning the case for a specific finding that the motive which impelled the decedent to make the transfers was precisely that which the court has thus definitely stated.*"

In *American Propeller Co.* v. *United States* (1937) 300 U. S. 475, the Court said (p. 479-480, footnote omitted):

> "While it is true that this court is not at liberty to refer to the opinion for the purpose of eking out, controlling or modifying the scope of the findings, the rule is not absolute and does not preclude reference to the opinion for all purposes whatsoever. It is well established that in case of ambiguity, extrinsic aid may be sought in order to settle the meaning of a statute or a contract. *We see no reason why the principle of that rule does not permit reference to the opinion of the court in order to clarify the meaning of a finding otherwise in doubt.*"

See also *United States* v. *Penn Foundry & Manufacturing Co., Inc.* (1949) 337 U. S. 198, at page 209.

III

THE COURT MAY CONCLUDE THAT THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED.

In the petition for certiorari the Government told this Court that the Court of Claims had "erroneously decided an issue of unusual constitutional importance in the twilight zone between non-compensable regulation and compensable takings" (p. 7.). It was certainly indicated that the issue presented was one of law, not one of fact.

The petition for certiorari summarized "the pertinent

facts as found by the Court of Claims", with citations to the Findings (p. 3-7).[31]

On the other hand, the petitioner's brief on the merits ignores the Findings of Fact almost as completely as if they had never been made, and presents a story which is in conflict with every important ultimate Finding, with many of the subsidiary or evidentiary Findings, and with the record as a whole (see above, p. 9-10).

At the same time the petitioner has changed the statement of the "Questions Presented", which it made in the petition for certiorari (p. 2), in the hope of opening the door to arguments that L-208 was intended (1) "to divert mining machinery and equipment to essential wartime enterprises", and (2) "to bring about the voluntary relocation of manpower to * * * essential war work" other than nonferrous mines (see above, p. 60-62).

It would take anyone who was not intimately familiar with the Findings of Fact of the Court of Claims and the other proceedings herein (including the petition for certiorari) many days to select such scattered portions of the petitioner's brief as do not involve either (1) a disregard of the Findings of the Court of Claims or (2) a departure from the petitioner's statement of the "Questions Presented" in the petition for certiorari.

The petitioner's arguments on points of law are predicated on the petitioner's version of the facts (expanded by

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[31] The only suggestion in the petition that the petitioner might challenge any of the Findings was in the first sentence of the section entitled "Questions Presented", where it was implied that L-208 was issued in order "to conserve scarce war materials" as well as "to bring about the voluntary relocation of skilled manpower to more vital mining activities" (p. 2). But since the Statement of the case purported to refer only to the "pertinent facts as found by the Court of Claims" (p. 3), no one who was not thoroughly familiar with the case would have suspected that the reference to conservation of "scarce war materials" (p. 2) might indicate an intention to challenge any of the Findings of Fact of the Court of Claims.

the petitioner's new statement of four alleged purposes of L-208) rather than on the Findings of the Court of Claims.

Under similar circumstances this Court has dismissed writs of certiorari as improvidently granted. *Houston Oil Co. of Texas, et al.* v. *Goodrich, et al.* (1918) 245 U. S. 440; *Southern Power Co.* v. *North Carolina Public Service Co.* (1924) 263 U. S. 508. See also *Rice* v. *Sioux City Cemetery* (1955) 349 U. S. 70.

IV

ORDER L-208 EFFECTED A TAKING WHICH IS COMPENSABLE UNDER THE FIFTH AMENDMENT.

Under the above heading, we will consider the first of the questions presented (see p. 5 above).

The purpose, nature and effects of Order L-208.

Our analysis of the consequences under the Fifth Amendment of the issuance of Order L-208 will be based on the following premises as to the purpose, nature and effects of the Order, all of which are established by the Findings of Fact and opinions of the Court of Claims or are conceded in the petitioner's brief:

1. The operators of the "nonessential" gold mines, about 150 in number, were "singled out" by a unique Order.[32]

2. That Order directly deprived them of their right to make any beneficial use of their mines, under penalty of fine or imprisonment, so long as the Order was in effect.[33]

3. The Order was issued by the WPB at the instance of the Army and the War Department.[34]

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[32] See above p. 13-18, 28-29, 49-50.

[33] See above p. 26-27.

[34] See above p. 22-26, and Appendix A p. 25-33.

4. The WPB was an agency of the President (Appendix D, p. 8) and the Order was approved and ratified by the President.[35]

5. The potential acquisition of critical materials by the nonessential gold mines had been eliminated seven months before the issuance of the Order, and the Order was not intended to have any relation to the allocation of critical materials.[36]

6. The Government did not requisition the critical materials, machinery and equipment in the mines which were closed down, and the Order was not intended to, and did not, allocate such critical materials, machinery and equipment to essential industries.[37]

7. The only real purpose of the Order was to "maneuver our manpower"—that is, to maneuver to the nonferrous metal mines some of the hardrock miners who were employed in the gold mines. It was hoped that if the mines were closed down, the hardrock miners who would be thrown out of work would seek and find employment in nonferrous metal mines, even though the latter might be far away and the working conditions unattractive.[38]

8. The order was "not an allocation order."[39]

9. The intent and effect of the Order were exactly the same as if the Army or the WPB had taken over the respondents' mines, discharged their hardrock miners (except those needed for standby operations), and tried to persuade them to go to the nonferrous metal mines.[40]

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[35] See p. 11, 27, 120-122.

[36] See above p. 11-13, and Appendix A p. 6-10.

[37] See above p. 34-37, and Appendix A p. 45-68.

[38] See above p. 13-18, and Appendix A p. 34-39.

[39] See below, p. 95-97.

[40] See below, p. 77-82.

10. During World War II there was no authority for the drafting of civilian labor. Neither the Army nor the WPB could require a hardrock miner at Lead, South Dakota, to go to Butte, Montana, or Climax, Colorado. Nor did the President have any such authority.[41]

11. The President did, however, have the authority to take any interests in the respondents' mines which he thought it necessary to take for any purpose of the War.[42]

12. By Order L-208 the Government exercised as complete a dominion and control over the respondents' rights to the beneficial use of their mines as it would have exercised if members of its staff or officers and soldiers of the Army had gone to the mines and taken physical possession of them.[43]

13. By Order L-208 the Government got what it wanted, since the respondents' hardrock miners were thrown out of work, and some of them did go to work in nonferrous metal mines.[44] It was no fault of the respondents that a relatively insignificant number of hardrock miners went to the nonferrous metal mines for more than transient employment, so that the value of what the Government got was less than it had hoped.[45]

14. There was no other instance where the WPB (or any other agency of the Government) closed down a business in order to have its employees discharged and thrown on the labor market. Nor, so far as we know, has anything of that kind happened at any other time in the history of this country.[46]

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[41] See above p. 18-21.

[42] See below p. 115-120.

[43] See below, p. 71-82.

[44] See above p. 37-39; see below, p. 85.

[45] See below p. 163.

[46] See above p. 28-29, 49-50.

15. Order L-208 was camouflaged in the hope of having it mistaken for an order dealing with the conservation and allocation of critical materials. The main effort of the petitioner's brief is to have the camouflage succeed.[47]

The "property" involved; the taking; and the reason why an issue has arisen as to compensation.

The respondent Homestake was the owner of "patented mining claims" in the Black Hills area of South Dakota near the City of Lead, South Dakota (Finding 54, R. 112). The respondent Central Eureka held the fee of gold-bearing lands at Sutter Creek, Amador County, California (Finding 77, R. 116). The respondent Idaho Maryland was the owner in fee of gold-bearing lands in the Grass Valley Mining District, County of Nevada, in the State of California (Finding 92, R. 120). The mines of the respondent Alaska-Pacific were in the Territory of Alaska; some were held in fee, others by location notices, and still others by a lease and royalty agreement, coupled with a purchase option (Finding 120, R. 127). The respondent Bald Mountain was the owner of gold-bearing lands in Lawrence County, South Dakota (Finding 139, R. 135). The respondent Ermont was the owner of a Quartz Lode Mining Claim in the County of Beaverhead, State of Montana (Finding 162, R. 140).

We will use the term "mines" to denote the respondents' interests in gold-bearing lands (whether fee, leasehold or mining claims), their mills and other surface installations, and their tangible personalty below the ground and on the surface.

In effect, the Government took over the respondents' mines, closed them down (except for the necessary standby operations), forced the discharge of the hardrock miners, and kept the mines idle until the Order was revoked on June 30, 1945.

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[47] See above p. 30-34, and below p. 97-101.

If the Executive had done that by an order which stated what was being taken and which provided "a mechanism for compensation",[48] no actions by the respondents would have been necessary. Moreover, if the Order had stated what was being done but had not provided a "mechanism for compensation", the Government would probably not have questioned the respondents' rights to judgments for compensation in actions under the Fifth Amendment. Difficulties have arisen in these cases only because the Government chose not to say frankly what was being done but camouflaged its action as a regulation of critical materials.

A. Order L-208 deprived each of the respondents of property within the meaning of the Fifth Amendment—the right of the respondent to mine and sell gold during the period when its mine was closed down.

L-208 deprived the respondents of their right to make any beneficial use of their mines while the Order was in effect. By doing so it deprived them of their mining businesses for that period.

The Court of Claims, summarizing its Findings of Fact, said (R. 19):

> "The record establishes that the purpose and intent of WPB in issuing L-208 was to deprive the gold mine owners and operators of the right to use their properties in the only way they could be beneficially used, i. e., to mine and sell gold for a profit, and that this was done in the unfounded hope that the underground workers thus deprived of their employment in the gold mines might seek employment in the nonferrous metal mines."

At R. 35:

> "L-208 was aimed, in all its provisions, directly at the beneficial use of the mining properties of the

[48] See Report No. 1605 of the Judiciary Committee of the Senate (Plaintiff's Exhibit 178, R. 855, 1559, 1570) quoted at pages 41-42 above.

gold mine owners, and the only intention reasonably inferrible from the language of the order itself and the circumstances surrounding its issuance was an attempt to temporarily deprive them of that property right. By the issuance of Order L-208 the defendant prohibited the carrying on of otherwise lawful mining operations and thereby placed a definite servitude on plaintiffs' profitable use of their mines which resulted in a temporary taking of that property right."

At R. 40-41:

"Despite its preamble and the authority cited for its issuance, the language of the order itself and the circumstances surrounding its issuance indicate that neither its purpose nor its effect was to conserve or allocate critical materials, equipment and facilities needed for defense, but was rather to deprive the gold mine owners of their right to make profitable use of their gold mines."

And at the conclusion of its opinion (R. 45):

"We conclude that L-208 by prohibiting the carrying on of otherwise lawful mining operations placed a servitude on plaintiffs' profitable or beneficial use of their mines and thus amounted to a temporary taking of that property right in the case of those mine owners and operators who were forced to close their mines by virtue of their compliance with those provisions of L-208 which prohibited them from using their materials, facilities and equipment to mine gold and which ordered them to close down their mines."

The taking by L-208 was obviously direct and intended, as the Court of Claims found.

The "property right" of each of the respondents which was taken by L-208 was clearly "a legally recognized 'property right'" such as is referred to in the petitioner's brief (p. 27-28).

The right of any of the respondents to extract gold bearing ore from its mine or mines was, of course, the foundation of the respondent's business of producing and selling gold.

It is immaterial that the Government did not take any fee or leasehold interests held by the respondents or any of their patented mining claims. It did take their right to make any beneficial use of what they had, and the Court below so held (R. 19, 35, 40-41, 45). That right was "property" within the meaning of the Fifth Amendment.

The controlling definition of "property" for the purposes of the Fifth Amendment was given by this Court in *United States* v. *General Motors Corporation* (1945) 323 U. S. 373, 377-378:

> "The correctness of the decision of the court below depends upon the scope and meaning of the constitutional provision: 'nor shall private property be taken for public use, without just compensation,' which conditions the otherwise unrestrained power of the sovereign to expropriate, without compensation, whatever it needs.
>
> The critical terms are 'property', 'taken' and 'just compensation'. It is conceivable that the first was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter. When the sovereign exercises the power of eminent domain it substitutes itself in relation to the physical thing in question in place of him who formerly bore the relation to that thing, which we denominate ownership. In other words, it deals with that lawyers term the individual's 'interest' in the thing in question. That interest may comprise the group of rights for which the shorthand term is 'a fee simple' or it may be the

> interest known as an 'estate or tenancy for years', as in the present instance. *The constitutional provision is addressed to every sort of interest the citizen may possess.*"[49]

There can be no question that the right to mine gold-bearing ore and to produce and sell gold therefrom is "property" within the meaning of the Fifth Amendment as thus interpreted.

What Justice Holmes said about the right to mine coal is equally true of the right to mine gold, *Pennsylvania Coal Co.* v. *Mahon* (1922), 260 U. S. 393, 414:

> "As said in a Pennsylvania case, 'For practical purposes, the right to coal consists in the right to mine it.' *Commonwealth* v. *Clearview Coal Co.*, 256 Pa. St. 328, 331. What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."

The Court of Claims said that Order L-208 placed a definite *servitude* on the respondents' profitable or beneficial use of their mines that amounted to a temporary taking of that property right (R. 35, 45).

Black's Law Dictionary (Fourth Ed., 1951) says, in part, in its definition of the term "servitude" (p. 1535):

> "When the freedom of ownership in land is fettered or restricted, by reason of some person, other than the owner thereof, having some right therein, the land is said to 'serve' such person. The restricted condition of the ownership or the right which forms the subject-matter of the restriction is termed a

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[49] See also *Grand Rapids Booming Co.* v. *Jarvis* (1874), 30 Mich. 308, 320-321 and *City of St. Louis* v. *Hill* (1893), 116 Mo. 527, 533-534. Both cases involved the question whether there had been a taking of private property and both cases defined "property" in terms of the right of a person to use, enjoy and dispose of land or personalty as distinguished from the land or personalty itself.

'servitude,' and the land so burdened with another's right is termed a 'servient tenement,' while the land belonging to the person enjoying the right is called the 'dominant tenement.' The word 'servitude' may be said to have both a positive and a negative signification; in the former sense denoting the restrictive right belonging to the entitled party; in the latter, the restrictive duty entailed upon the proprietor or possessor of the servient land."

3 *Powell on Real Property* says that in Roman law the term "servitude" encompassed, among other things, "the easement proper of the English law" (p. 388-389, Note 31) and, with respect to a negative easement, that (p. 391, footnote omitted):

> "* * * a negative easement consists solely of a veto power. The easement owner has, under such an easement, the power to prevent the servient owner from doing, on his premises, acts, which, but for the easement, the servient owner would be privileged to do."

The Restatement of the Law of Property, Vol. V (1944), defines a negative easement (Section 452; p. 2912):

> "A negative easement assures to the owner thereof a particular use or enjoyment of the land subject to the easement by enabling him to prevent the possessor of the land from doing acts upon it which, were it not for the easement, he would be privileged to do."

In *United States* v. *Dickinson* (1947) 331 U. S. 745, 748 this Court said:

> "*Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time.* The Fifth Amendment expresses a principle of fairness and not a technical rule of pro-

> cedure enshrining old or new niceties regarding 'causes of action'—when they are born, whether they proliferate, and when they die."

This Court used the term "*servitude*" to describe the nature of the taking effected in *United States* v. *Causby* (1946), 328 U. S. 256, 266-267, where the servitude was imposed by frequent low level flights of military aircraft over the plaintiffs' farm.

In *Peabody* v. *United States* (1913) 231 U. S. 530, this Court had previously used the term "*servitude*" with respect to action which would have deprived the owner of land of its profitable use without any entry by the Government onto the land itself (p. 538):

> "It may be assumed that if the Government had installed its battery, not simply as a means of defense in war, but with the purpose and effect of subordinating the strip of land between the battery and the sea to the right and privilege of the Government to fire projectiles directly across it for the purpose of practice or otherwise, whenever it saw fit, in time of peace, with the result of depriving the owner of its profitable use, the imposition of such *a servitude* would constitute an appropriation of property for which compensation should be made."

To paraphrase what was said in *United States* v. *Dickinson, supra,* inroads were made by L-208 on the respondents' mines "to an extent that, as between private parties, a servitude" would have been acquired.[50] The Government took dominion and control over the mines to the extent of requiring them to remain idle except for standby maintenance.

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[50] In Note 14 (p. 28) of the petitioner's brief it is stated: "Where a constitutional taking is implied, it is assumed that the United States has acquired a definite interest in the property, permanent or temporary, such as • • • an easement, a servitude, • • •."

B. It is immaterial that "the United States took no gold" and that there was no physical invasion of the respondents' mines.

The petitioner's brief says that "Order L-208 took absolutely nothing for the Government in the physical sense" and, after mentioning that there was no requisitioning of materials, machinery or equipment, it adds (p. 45):

> "The United States took no gold; as much gold remained for extraction when the restrictions of L-208 were lifted as when they were imposed."

This argument is so patently fallacious that it seems almost an imposition on the Court to refer to it. There is universal recognition, whether by geologists, by economists or by businessmen, that the present right to operate a profitable mine over a period of time has value, and the fact that the ore is left in the ground and can be extracted later—perhaps a great many years later—does not establish that nothing has been taken from the owner.

* * * * *

The Government emphasizes that there was no physical invasion of the respondents' mines—that neither the WPB, which issued the Order, nor the Army, at whose instance the Order was issued, took physical possession of the mines (p. 17, 27-28). That is beside the point.

The petitioner's argument amounts to this: that there cannot be a taking of a property right which relates to realty or tangible personalty unless the realty is invaded physically or the tangible personalty is taken physically. That argument obviously involves a failure to distinguish between (1) realty and tangible personalty, which are physical things and can be "invaded", and (2) property rights, which are not physical things and cannot be "invaded". Moreover, it is a mere *ipse dixit* of the petitioner, for which no authority is or could be cited.

It is clear that, for there to be a taking of the right

to the beneficial use of a mine, factory or other plant, it is not necessary for the Government physically to invade the mine, factory or plant.

By Order L-208 the WPB, with the approval of the President, exercised complete dominion and control over the respondents' mines. It directed each of the respondents to "close down in the shortest possible time, the operation of [its] mines" (Finding 43, R. 102). The petitioner's statement that "the Government did not otherwise interfere with respondents' exclusive possession and control of the mines" (p. 3) means merely that the respondents were allowed to continue "minimum maintenance to keep mines dewatered and in standby condition" (Finding 41, R. 101; Finding 43, R. 102-103). The real dominion and control was exercised by the Government, not by the respondents.

It is interesting to compare L-208 with what the Secretary of the Interior did by his "Order for Taking Possession" in *United States* v. *Pewee Coal Co.* (1951) 341 U. S. 114, 116:

> "To convince the operators, miners and public that the United States was taking possession for the bona fide purpose of operating the mines, the Government formally and ceremoniously proclaimed that such was its intention. It required mine officials to agree to conduct operations as agents for the Government; required the American flag to be flown at every mine; required placards reading 'United States Property!' to be posted on the premises; and appealed to the miners to dig coal for the United States as a public duty."

Paragraph (b)(1) of Order L-208 constituted as complete an exercise of dominion over the respondents' mines as the Order for Taking Possession in *Pewee Coal Co.* The paragraph contained a direction to "each operator of a nonessential mine" to immediately take all such steps as might be necessary to close down, and to "close down, in

the shortest possible time, the operations of such mine." Both in substance and in form it was the kind of a directive which might have been issued by the Board of Directors of an operating company to the manager of operations. The paragraph was not even worded as a prohibition, restriction or regulation of mining operations—it was a directive to take affirmative action to close down.

The opinion in *Pewee Coal Co.* mentions that the Secretary's order was accompanied by (1) a requirement that mine officials agree to conduct operations as agents for the Government, (2) a requirement that the American flag be flown at every mine, and that placards reading "United States Property!" be posted on the premises, and (3) an appeal to the miners to dig coal for the United States as a public duty. The first of these features had its counterpart in the directive in L-208 that mining operations be closed down; in *Pewee* the formal agreements to conduct operations as agents for the Government were incident to the continuance of operations, and the action of the respondents' mine officials in closing down operations in obedience to the directive in L-208 was not materially different. The appeal to the Pewee Coal Co. miners finds its counterpart in the appeal of the Chairman of the WPB and the Chairman of the War Manpower Commission to the gold miners to transfer to nonferrous metal mines (Appendix A, p. 30; Finding 45, R. 105; Plaintiff's Exhibit 34, R. 430, 1323). The only difference between what happened in *Pewee Coal Co.* and what happened under L-208 is that the operators of the nonessential gold mines were not required to fly the American flag or post placards. Any "invasion" in *Pewee Coal Co.* was purely symbolic.

In *United States* v. *Causby* (1946) 328 U. S. 256, the Court held that flights of military aircraft over a chicken farm near a military airport, which were so low and frequent as to be a direct and immediate interference with the enjoyment and use of the land as a chicken farm, were

as much an appropriation of the plaintiffs' right to the use of the land as a more conventional entry upon it. The opinion discussed the situation which would exist if by reason of the frequency and altitude of the flights the owners of the land could not use it for any purpose and the Government's concession that in that event there would be a taking. The Court said (p. 261-262):

> "We agree that in those circumstances there would be a taking. Though it would be only an easement of flight which was taken, that easement, if permanent and not merely temporary, normally would be the equivalent of a fee interest. It would be a definite exercise of *complete dominion and control* over the surface of the land. The fact that the planes never touched the surface would be as irrelevant as the absence in this day of the feudal livery of seisin on the transfer of real estate. The owner's right to possess and exploit the land—that is to say, his beneficial ownership of it—would be destroyed."

The opinion in *Causby* indicates what is decisive, viz., whether there is an exercise of "dominion and control". Under Order L-208 there was an exercise of dominion and control as complete as that in the hypothetical case put in the *Causby* opinion.

In *Causby* the fact the planes never touched the surface of the land was considered "as irrelevant as the absence in this day of the feudal livery of seisin on the transfer of real estate." When a Government agency issues an order which asserts complete dominion and control over a mine, it is similarly irrelevant whether the taking is accompanied by an entry onto the surface or a descent to the levels at which the ore is being extracted. In the Middle Ages dominion and control ordinarily had to be exercised by physical presence and word of mouth or gesture. In modern days, dominion and control of a mine, factory or plant can be exercised effectively from thousands of miles away.

In *Richards* v. *Washington Terminal Company* (1914) 233 U. S. 546, it was held that the owner of a house near a portal of a tunnel which Washington Terminal Company had built by authority of Acts of Congress, and from which there was a continual emission of gases and smoke, was entitled to compensation on the ground that the resulting depreciation of the value of plaintiff's house amounted to a "taking" of the plaintiff's property.[51] Although the case did not involve any physical invasion of plaintiff's land, this Court said at page 557:

> "Construing the acts of Congress in the light of the Fifth Amendment, they do not authorize the imposition of so direct and peculiar and substantial a burden upon plaintiff's property without compensation to him."

The burden imposed on the respondents' property rights by Order L-208 was certainly "direct and peculiar and substantial".

Other pertinent decisions are *United States* v. *Welch* (1910) 217 U. S. 333, 339, which was cited by the Court below (R. 31, Note 10; R. 43); *William C. Atwater, Jr.* v. *United States* (1946) 106 C. Cls. 196;[52] and *Edward P.*

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[51] This taking is to be distinguished from the consequential effect of a legalised nuisance, also discussed in *Washington Terminal Company*, which is mentioned in *United States* v. *Causby*, 328 U. S. at p. 262.

[52] In *Atwater* v. *United States*, the plaintiffs were the owners of certain property on Fire Island, New York. The military authorities built a target range near the plaintiffs' property and established a safety zone which included the plaintiffs' property and from which all persons, including the plaintiffs, were excluded during the Government's use of the target range from December 1941 until June 30, 1944. Although there was no actual physical occupation or invasion of the plaintiffs' property, the Court of Claims held that there was a compensable taking because the plaintiffs were denied access to their property. The Court said (p. 207):

> "The land was not damaged; it was merely part of a safety zone. But just compensation is not to be denied the plaintiffs, for there was an actual taking and intent to take, although it took the form only of extinguishing, for the time being, the right of ingress."

Stahel & Co., Inc. v. *United States* (1948) 111 C. Cls. 682, cert. den. (1949) 336 U. S. 951, which was discussed fully in the opinion of the Court of Claims (R. 28-30).

Numerous state courts have also given expression to the rule that "any substantial interference with private property which destroys or materially lessens its value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed, is, in fact and in law, a taking, in the constitutional sense, to the extent of the damages suffered, even though the title and possession of the owner remain undisturbed".[53]

Here, at the instance of the Army and War Department, and with the approval of the President (despite a protest from 21 Senators), the WPB directly and explicitly deprived the respondents, under penalty of fine and imprisonment, of the right to make any beneficial use of their mines. The Order was announced to the respondent Homestake by the Under Secretary of War (Appendix A, p. 32). What difference can it possibly make that the Army did not send officers, or the WPB send members of its staff, to symbolize the exercise of dominion which the Order represented?

C. It is immaterial that the Government did not operate the respondents' mines.

In the discussion in the petitioner's brief of what is called "an unintended taking", it is said (p. 28, italics in original): "* * * there must generally be (a) an actual invasion by the Federal Government of private property,

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[53] Quoted from *Stockdale* v. *Rio Grande Railroad* (1904) 28 Utah 201, 211. See also *In re Forsstram* (1934) 44 Ariz. 472, 481; *Nalon* v. *City of Sioux City* (1933) 216 Iowa 1041, 1044; *Webster County* v. *Lutz* (1930) 234 Ky. 618, 620; *Pearsall* v. *Board of Supervisors* (1889) 74 Mich. 558, 561; *City of St. Louis* v. *Hill* (1893) 116 Mo. 527, 533-534; *Forster* v. *Scott* (1893) 136 N. Y. 577, 584; *Miller* v. *Beaver Falls* (1951) 368 Pa. 189, 196; *Philadelphia Appeal* (1950) 364 Pa. 71, 74-75; *Matter of Sansom Street* (1928) 293 Pa. 483, 489-490; *Early* v. *South Carolina Public Service Authority* (1955) 228 S. C. 392, 407-408.

(b) some public *use* of that property, and (c) that *use* must be *by* the United States." The contention in the brief is that the Government did not use the respondents' property.

The petitioner's argument amounts to this: that if a mine, factory or other plant is taken by the Government, compensation need not be paid unless the Government either continues the operation theretofore conducted or commences some new operation. If this were true, it would mean that if the Government took over a related group of five factory buildings, converted three to the manufacture of a new product and left two idle, it would not be deemed to have taken the two. That is, of course, not the law.

In *Kimball Laundry Co.* v. *United States* (1949) 338 U. S. 1, this Court held that when the Army took the Kimball Company's laundry, it also took the Company's "trade routes", although it could not use them. The Court said (p. 13):

> "• • • an exercise of the power of eminent domain which has the inevitable effect of depriving the owner of the going-concern value of his business is a compensable 'taking' of property. See *United States* v. *General Motors Corp.*, 323 U. S. 373, 378; cf. *United States* v. *Causby*, 328 U. S. 256. If such a deprivation has occurred, the going-concern value of the business is at the Goverment's disposal whether or not it chooses to avail itself of it. Since what the owner had has transferable value, the situation is apt for the oft-quoted remark of Mr. Justice HOLMES, 'the question is what has the owner lost, not what has the taker gained.' *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 195."

The taking of the respondents' right to make a beneficial use of their mines, with the directive that operations be closed down, was analogous to a case where the Government takes property and destroys it. This was pointed out by the Court below (R. 43, italics in original):

"That the Government did not make any physical use of the gold mines does not deprive its action of its character of a taking. The Supreme Court has held that *destruction* of private property for a *public purpose* is the equivalent of a *taking* of private property for a *public use*. *United States* v. *Welch*, 217 U. S. 333; *Kimball Laundry Co.* v. *United States*, 338 U. S. 1."

The controlling principle was stated by this Court long ago in its decision in *Pumpelly v. Green Bay Company* (1872) 13 Wall. 166, 177-178:

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of public good, which had no warrant in the laws or practices of our ancestors."

So also in *United States* v. *General Motors Corporation* (1945) 323 U. S. 373, 378, this Court said:

"In its primary meaning, the term 'taken' would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But the construction of the phrase has

not been so narrow. The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. *Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.*"

When the Government exercised dominion and control over the respondents' mines, it made the use of the mines which it wanted. It so happened that that use consisted of keeping the mining operations idle except for minimum necessary maintenance. However, that was the particular kind of use, although in a sense a negative one, which the Government wanted.

As a consequence of its exercise of dominion and control over the use of the respondents' mines, the Army and the WPB accomplished their objective: the discharge of the hardrock miners. Thus the Government got what it wanted. And it was no fault of the respondents that what the Government got was so disproportionate to the injuries sustained by the respondents, their employees and the communities where their mines were located (see below, p. 103).

D. The cases cited by the petitioner which involved wartime controls of prices, rents, profits and materials are inapplicable.

At pages 32-33 the petitioner's brief cites *Bowles* v. *Willingham*, 321 U. S. 503, *Yakus* v. *United States*, 321 U. S. 414, and *Lichter* v. *United States*, 334 U. S. 742, and also a number of cases in Note 17,[54] all of which involved

[54] The petitioner's Note 17 reads:

"See, also, *Block* v. *Hirsch*, 256 U. S. 135; *Morrisdale Coal Co.* v. *United States*, 259 U. S. 188; *Highland* v. *Russell Car Co.*, 279 U. S. 253; *Wilson* v. *Brown*, 137 F. 2d 348 (Em. Ct. App.); *Taylor* v. *Brown*, 137 F. 2d 654 (Em. Ct. App.), certiorari denied, 320 U. S. 787; cf. *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, 569-570; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 392-396."

wartime controls of prices, rents or profits. Such controls of prices, rents and profits are in no way analogous to Order L-208.

The legislation authorizing such controls contemplated that those subject to regulation would receive a fair and equitable compensation for their property sold or rented or for their efforts in fulfilling war contracts. The price control legislation called for the fixing of prices which in the judgment of the administrator would be "generally fair and equitable". Cf. *Yakus* v. *United States* (1944) 321 U. S. 414, 420. The rent control legislation contained a similar requirement for the establishment of "fair and equitable" maximum rents. Cf. *Bowles* v. *Willingham* (1944) 321 U. S. 503, 516. The Renegotiation Acts were designed to insure only that profits on war contracts would not be "excessive". Cf. *Lichter* v. *United States* (1948) 334 U. S. 742, 793 *et seq.*[55]

None of the statutes providing wartime controls of prices, rents or profits required the property owners to keep their property idle and nonproductive, preventing them from earning any return at all.

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[55] The petitioner's brief quotes (p. 32) the following sentence from this Court's opinion in *Bowles* v. *Willingham:*

> "A nation which can demand the lives of its men and women in the waging of • • • war is under no constitutional necessity of providing a system of price control on the domestic front which will assure each landlord a 'fair return' on his property".

The meaning of what this Court said was not at all what might be supposed by a casual reader of the quotation.

The statement was made by this Court in a discussion as to whether the "generally fair and equitable" standard of the rent control legislation was adequate or whether it was necessary that rentals be fixed, like utility rates, so as to produce a "fair return" on an investment (321 U. S. 516-519). Since the rent control legislation called for "generally fair and equitable rentals", the quoted sentence from the Court's opinion cannot be interpreted to mean that the Government is free, for example, to deprive landlords of *any* return on their properties or to order them to "close down" their properties, without making just compensation.

Moreover, the statutes imposing wartime controls of prices, rents and profits all provided for systems of regulation which were general in their application. Any classifications which they made or authorized were reasonably related to the statutory objectives—to see that prices, rents and profits should not be more than fair and equitable. By contrast, L-208 was not the product of any general system for the control of nonessential industries. The operators of nonessential gold mines were "singled out".

Such wartime controls over prices, rents and profits may have contributed to the closing down of business enterprises but, if and when they did, the closing down was merely a consequence of the control—it was not the purpose of the control. By contrast, the closing down of nonessential gold mines was the direct intended effect of Order L-208, which prescribed that the operator of each such mine "shall immediately take all steps as may be necessary to close down, and shall close down, in the shortest possible time" (R. 102).

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At pages 38-40 the petitioner's brief cites *St. Regis Paper Co.* v. *United States* (1948), 110 C. Cls. 271, cert. den. 335 U. S. 815, *Steuart & Bro.* v. *Bowles* (1944), 322 U. S. 398, and other cases involving losses due to the wartime allocation of materials.

The distinction between Order L-208 and the cases which involve the wartime allocation of materials is made clear by comparing the instant case with *St. Regis Paper Co.* v. *United States*. In that case, which was discussed fully in the opinion below (R. 24-26), the WPB, faced with shortages in the supply of pulpwood needed in essential war industry, issued its Order M-251 prohibiting the consumption, processing and delivery of pulpwood in certain specified areas, except with the specific authorization of the WPB. As a consequence of M-251, which was ultimately found to be a proper and valid regulation of the use of materials

needed in the war effort, the plaintiff's plant was unable to obtain or use pulpwood and was compelled to discontinue manufacturing and selling all bleached and unbleached kraft pulp for a period of more than a year. St. Regis sought compensation in the Court of Claims. That Court dismissed the petition on demurrer and this Court denied certiorari. The Court below pointed out the salient distinctions between M-251 in *St. Regis* and Order L-208 (R. 26):

> "The court held that M-251 did not require the closing of plaintiff's plant nor did it interfere with plaintiff's use of the plant; that on the contrary, the order represented a valid exercise of WPB's admitted power to allocate a scarce material such as pulpwood, and that any injury to plaintiff's profitable use of its plant, or any loss in value of its plant, were merely consequential and therefore did not amount to a taking and were not compensable. The terms of the order itself certainly bore out the court's conclusion since the order merely represented an attempt by the Government to secure all the available supply of pulpwood in the area by freezing the supplies on hand with the owners in the area and immediately placing mandatory orders directing delivery to specified users elsewhere, and by prohibiting the users in the area in question from acquiring any more pulpwood."

In other words, the St. Regis Paper Company plant closed down, under the direction of the St. Regis Paper Company management, as a result of inability to obtain pulpwood. Since the WPB's Order M-251 controlled the allocation of pulpwood, the closing of the St. Regis plant may be said to have been a result of M-251. But the closing of the St. Regis plant was not an objective of the order; it was merely a consequence of a proper regulation of the use of materials needed in the war effort.

In the *St. Regis* opinion the Court of Claims emphasized that (110 C. Cls. p. 279):

> "This does not mean, however, and the petition does not purport to so charge, that it was the Board's objective to shut down plaintiff's plant. It did not issue its General Preference Order No. M-251 to accomplish such an end."

By contrast, under L-208 the nonessential gold mines were closed down by direction of the WPB which was contained in an Order that had no relation to the allocation of critical materials (see above, p. 13-18, 29-37; see below, p. 95-97; Appendix A, p. 34-39).

E. Gold mining was not a "public evil", subject to suppression on that account.

The petitioner's brief relies heavily (p. 33-36) on decisions which upheld the wartime prohibition of liquor traffic by the Federal Government in World War I (*Hamilton* v. *Kentucky Distilleries Co.* (1919) 251 U. S. 146; *Jacob Ruppert* v. *Caffey* (1920) 251 U. S. 264), and on cases sustaining prohibitions by the states of the use of property for purposes determined by state legislatures to be injurious to the health, morals or safety of the community.[56] All such cases involved statutes designed to suppress a public evil.

The principle of the cases arising out of the exercise of the police power by the states is summarized in the paragraph from the opinion in *Mugler* v. *Kansas* (1887) 123 U. S. 623, 669, which the petitioner has quoted (p. 35-36):

> "The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the

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[56] *Mugler* v. *Kansas* (1887) 123 U. S. 623 (liquor prohibition); *Powell* v. *Pennsylvania* (1888) 127 U. S. 678 (sale of oleomargarine); *Lawton* v. *Steele* (1894) 152 U. S. 133 (prohibition against maintaining fishing nets on state waters); *North American Storage Co.* v. *Chicago* (1908) 211 U. S. 306 (diseased poultry); *Miller* v. *Schoene* (1928) 276 U. S. 272 (destruction of disease-bearing trees).

> existence and safety of organized society, cannot be burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, *by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.* The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner."

In *Hamilton* v. *Kentucky Distilleries Co., supra,* the potential evil of liquor traffic was recognized to the point that the plaintiff conceded that the Congress might temporarily regulate or forbid the sale of liquor "in order to guard and promote the efficiency" of the armed forces and defense workers (251 U. S. at p. 155). In *Jacob Ruppert* v. *Caffey, supra,* it was "assumed" that the war need demanded the immediate discontinuance of the manufacture of malt liquors (251 U. S. at p. 302).

Relying on these cases, bearing upon the right of a lawmaking body to prohibit a noxious use of property, the petitioner makes the untenable argument that gold mining was subject to suppression by the WPB.

In this connection the opinion of the Court of Claims said (R. 42-43):

> "The only circumstance under which the Government may escape the obligation to pay for property which is destroyed or taken by the authorized action of its agents, is where, in time of war, that property is inherently dangerous, or is being used in such a manner as to clearly endanger the public safety. *Hamilton* v. *Kentucky Distrilleries Co.,* 251 U. S. 146; *United States* v. *Caltex,* 344 U. S. 149.

> Gold mines which did not possess a serial number under WPB Order P-56 because they did not produce significant amounts of critical metals in addition to gold, were determined by WPB to be 'nonessential,' but we know of no precedent which would justify our holding that a nonessential industry or business was, *ipso facto,* one endangering the public safety in time of war. That such an industry could be regulated, and strictly regulated in wartime, is unquestioned, and resulting losses are not compensable if the action taken is truly regulatory in nature. But the power to regulate a nonessential but nondangerous industry in wartime is not the power to destroy, and limitation is not the equivalent of confiscation."

During World War II other nonessential industries were allowed and even encouraged to continue with the help of the WPB's policy of allowing limited priority assistance to such industries for maintenance, repair and operating supplies in order that dislocation of the civilian economy be avoided (see above, p. 13). The reason why the gold mining industry was singled out had nothing to do with the nature of gold mining as an occupation or with the nature of gold itself.

In the cases cited in the petitioner's brief, the determinations that products, occupations or activities constituted public evils were made by the Congress or by the state legislatures. Whether or not power to make such a determination could have been delegated to the President or to the WPB, certainly no power to determine that gold mining was noxious was delegated.

Moreover, neither the WPB nor the President made any such determination. Order L-208 was not issued on the theory that gold mining or gold was a public evil.

The petitioner says (p. 36, footnote omitted):

> "* * * that the power of a nation at war to restrict or to prohibit the use of property because, in the judgment of those whose responsibility it is to deter-

> mine, the use impairs or its non-use contributes to the war effort, is no less extensive than the power of the state to impose similar restrictions upon property in the name of the health, morals, or safety of the community."

If the foregoing statement is meant to be applicable to this case, it seems to imply that, *without any enabling statute,* (a) the President, or such agency as he may designate, has in time of war the unqualified power to restrict or prohibit, at will, the use of any property which the President or the agency may choose, (b) a property owner is to have no recourse if the restriction or prohibition is necessary in the judgment of the authority which decides upon the restriction or prohibition, and (c) the Fifth Amendment to the Constitution must be subordinated to any such determination. No President of the United States has ever asserted such a power.

* * * * *

In view of the foregoing, further comments about gold mining and gold may be superfluous; but a brief reply to certain suggestions in the petitioner's brief seems in order.

Two pages about the Congressional powers over gold conclude with an acknowledgment that the national power under the coinage authority of the Constitution is not involved in these cases (p. 46-48). We are concerned, not with gold as money or a commodity, but with gold mining.

However, there seem to be hints in the petitioner's brief that there is something noxious about gold. The brief seems to liken it to liquor or beer, quotes passages which use such terms as "peculiar" and "noxious" and speaks of the petitioner's use of their property as "detrimental to the public interest" (p. 33-36). But we cannot believe that the Government, which itself has purchased all the gold produced in the United States for more than two decades, would argue that the metal itself is noxious.

Moreover, gold mining in the United States and Alaska has made contributions the importance of which should not be minimized.

As to the largest of the gold mines affected by L-208, the Court of Claims found (Finding 66, R. 114):

> "The working conditions at Homestake and the living conditions in the communities surrounding Homestake in 1942 were superior to those at the nonferrous metal mines to which the Government sought to transfer the Homestake miners. Homestake employees enjoyed free medical and hospital services, group insurance, pensions, recreational facilities, and many of the older miners owned their own homes."

In a memorandum dated September 9, 1942, which was sent by the Chief of the Miscellaneous Minerals Branch of the WPB to the Deputy Director General for Industry Operations (Finding 27, R. 85-90), the dependence on the gold mines of the "old established mine employees", of the communities and of some of the states was pointed out[57] (R. 87-88). As to the communities and employees the memorandum said (R. 88):

> "Losses in county and municipal taxes will be felt much more severely by the communities in the vicinity of the mines. In this respect, shutting down mining operations is not comparable with shutting down other industrial operations in communities where enterprise is diversified; in the West it is generally true that the mine is the sole major source of income for local communities. For example, it has been reported that the Homestake Mining Company pays 65 percent of the local com-

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[57] The petitioner's Appendix A quotes a 9-line paragraph from this memorandum (p. 98), but makes no reference to the paragraphs quoted above or to a statement in the memorandum of the purpose of the proposed shutdown of the gold mines (see Appendix A, hereto, p. 15-18).

munity taxes and 50 percent of the county taxes; that the wage earners and those servicing them pay the balance largely from the $4,500,000 in annual wages paid by the company. At least 19,000 people, the population of the county, are directly or indirectly dependent upon its operation.

For reasons stated in the last paragraph, hardships faced by old established mine employees will be severe. There is virtually no possibility of converting the facilities at the mines to war work."

The Court of Claims found (Finding 50, R. 106-107) that on and prior to October 8, 1942, "officials of WPB who were responsible for the issuance of L-208 knew"

"* * * (7) that in many instances the communities in the vicinity of gold mines were entirely dependent upon the operation of the mines for their continued prosperity; (8) that the deeper mines were likely to deteriorate and become flooded if closed down, and that many operators would not be able to afford the cost of keeping their mines safe and accessible or their machinery, equipment and buildings in repair during a long period of unproductivity."

As to Lead, South Dakota, and that state, the Court found (R. 115-116):

"71. The closing of the Homestake mine pursuant to Order L-208 had far-reaching and drastic repercussions in the city of Lead and the surrounding communities. The population declined sharply, more than 750 homes and apartments were left vacant and boarded up, and 36 business establishments which had served the communities were left vacant.

72. In the years immediately prior to the issuance of Order L-208, the State of South Dakota received about $1,000,000 per year, or approximately ten per cent of its annual revenues, from Homestake. The State was deprived of this source of revenue by the order closing the gold mines."

Of course, operators of gold mines contributed many millions a year in income taxes to the Federal Government (cf. R. 1233).

Nevertheless, within the Government there was some hostility to the mining of gold and a belief in some quarters that "a reduction in gold mining should be envisaged for the post-war period" (R. 1176). Whether, and if so to what extent, that feeling contributed to the forces which resulted in the issuance of Order L-208, it is impossible to tell. Certainly neither the WPB nor the President adopted the policy that there should be a reduction in gold mining in the postwar-period.

Nor did either determine that gold mining was a public evil.

F. The Court of Claims found as a fact that Order L-208 was not a regulation.

In the petition for certiorari this Court was told that these cases presented "an issue of unusual constitutional importance in the twilight zone between a non-compensable regulation and compensable takings" (p. 7).

It is perfectly clear that L-208 was ***not*** a regulation, and the Court of Claims so found as a fact.

While L-208 recited that there was "a shortage in the supply of critical materials for defense, for private account and for export which are used in the maintenance and operation of the gold mines", it was not the purpose of Order L-208 to deal with any such alleged shortage. The only real purpose of the Order was to close down the non-essential mines, throw the hardrock miners on the labor market and try to maneuver them to the nonferrous metal mines. Furthermore, the Order was not reasonably adapted to function as a critical materials regulation.

What we have just said is abundantly supported by the Findings of Fact of the Court of Claims, particularly Findings 46, 47, 48, 49, 50 and 51 (R. 105-107).

The fundamental issue between the majority of the Court of Claims, on the one hand, and Chief Judge Jones, on the other hand, was whether the only real purpose of Order L-208 was to close the gold mines so as to maneuver hardrock labor to the nonferrous metal mines and the Order was not a critical materials measure at all, as the majority held, or whether the direction in paragraph (b) (1) of the Order that the mines be closed down should "be considered as mere surplusage" and the balance of the Order sustained as a valid critical materials regulation, as the Chief Judge thought. This becomes entirely clear on an analysis of Chief Judge JONES' dissenting opinion (R. 58-61) and a comparison of the views expressed by the Chief Judge with those in the majority opinion (R. 12-45).

Judge LARAMORE wrote (R. 61):

> *"The majority opinion points out that L-208 was not an allocation order, as it purported to be, but rather was clearly an order closing gold mines deemed nonessential to the war effort;* i.e., those mines whose gold production in dollar value exceeded 30 percent of their total production."

Judge LARAMORE's opinion, read as a whole, shows that he agreed with the majority that "L-208 was not an allocation order, as it purported to be", so that there was in effect, therefore, a 4-to-1 vote that L-208 was not an allocation order: and that vote was consistent with the Findings of Fact agreed upon by the majority.

We submit that *it was a question of fact—predominantly, if not exclusively—whether or not L-208 was an allocation order; that that question of fact was decided against the petitioner by the Court of Claims; and the Findings of the Court of Claims are abundantly supported by the evidence.* If there were any doubt that it was primarily, if not exclusively, a question of fact whether L-208 was "an allocation order", that doubt would be resolved by a read-

ing of the petitioner's brief, which is an attempt to retry the facts in the hope of establishing that the Order was an allocation order.

V

THE CAMOUFLAGE OF ORDER L-208 CANNOT AVAIL THE PETITIONER AND DID NOT CONVERT A TAKING INTO A REGULATION.

If Order L-208 had set forth the purpose and intent of the Order frankly in the preamble and the citation of authorities, and had omitted the superfluous references in paragraphs (b)(2) and (b)(3) to "any material, facility or equipment", it would have been entirely clear that there was a taking under the Order and the Government would presumably not have contested the right of the respondents to just compensation.

The preamble and other features of Order L-208 were camouflage.

We have already dealt so fully with the only real purpose of Order L-208, and with the camouflage in the Order (the preamble, paragraphs (b)(2) and (b)(3), and the citation of authority), that it would be an imposition on the Court to go over the same ground again (see above, p. 13-18, 30-34; Appendix A, p. 33-68).

While the Court of Claims did not use any such expressions as "camouflage", "pretext" or "window dressing", its Findings could have only one meaning even without the confirmation provided by the Court's opinions (see above, p. 30-34). The opinions point up the only conclusion which can be drawn from the Findings.

We have just quoted, at page 96, the portion of the opinion of Judge LARAMORE, dissenting, which shows that there was no doubt in the minds of any of the Judges of the Court of Claims as to what was meant by the decision

of the majority, i.e., that Order L-208 was not what "it purported to be".

Moreover, the petitioner's brief expressly concedes *that the Court of Claims concluded "that L-208 was not devised for the purpose of conserving or allocating materials"* (p. 53). This concession is, of course, tantamount to an acknowledgment that the Court of Claims found that L-208 was not devised for the purpose for which the preamble said that it was devised.

That Court had previously pointed out that the respondents had "a most difficult burden" to sustain in proving the allegations of their petitions. *Idaho Maryland Mines Corp.* v. *United States* (1952) 122 C. Cls. 670, 689. And certainly it was no light task to establish that the preamble and other provisions of an Order of the importance of L-208 were camouflage. But that is exactly what the respondents did establish.

In saying that the Order was camouflaged, we have not the remotest idea of reflecting on the patriotism, integrity, character or personal motives of the Chairman or any members of the WPB, or any of the others in authority, such as General Somervell, who made their influence felt.

It is unnecessary to try to decide what consideration was given to the preamble and the camouflage features of Order L-208. The question is not *why* they were included in the Order, but *whether* they are to serve successfully as camouflage.

The camouflage of the Order cannot succeed.

The petitioner says (p. 61) that "it is settled that if executive action is justified by a lawful purpose, it is not rendered unlawful by the motive of those responsible for the action even if that motive were otherwise illegal" and that "the motives of WPB in issuing the order were

proper ones". This contention has no relevancy. The judgment of the Court of Claims is based on the conclusion that Order L-208 was issued for "a lawful purpose"—in order to take the respondents' property in the hope that hardrock miners would seek and obtain employment in the nonferrous metal mines. It has not been held, and the respondents did not argue, that the Order was "unlawful".

Certainly the Court of Claims was not bound by the statement of the WPB, in the preamble of L-208, that the Order was being issued because of "a shortage in the supply of critical materials for defense, for private account and for export which are used in the maintenance and operation of gold mines". The Court was not required to accept as a fact what the evidence before it showed conclusively was not the fact.

Throughout this litigation the Government has recognized that there was a justiciable issue as to the purpose of the Order.[58]

An inquiry into the purpose of the Order is not an inquiry into motives, in the sense that anyone is trying

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[58] The Commissioner made a finding that, while the dominant purpose of L-208 was "the releasing of mine labor", another purpose was "as stated in the preamble" (R. 7-8). The respondents objected to so much of the finding as set forth that one of the purposes of the Order was "as stated in the preamble that the fulfillment of the requirements for the defense of the United States had created a shortage in the supply of critical materials which had been used in the maintenance and operation of gold mines" (Appendix A, p. 34). The Government was satisfied with the Commissioner's finding as to the purposes of the Order, and the Defendant's Exceptions and Brief, filed November 5, 1954, contained a long narrative at the conclusion of which the Commissioner's finding was quoted with evident satisfaction (p. 380-405). There was no contention that the Court of Claims had no power to determine the purpose of the Order.

In the petition for certiorari the statement of the questions presented started by assuming that the Order had two purposes, of which one was that stated in the preamble and the other the labor purpose (p. 2). In the petitioner's brief on the merits the statement of the question presented starts with the assumption that the Order had four purposes (see above, p. 61-62).

to disclose any secret or personal considerations which motivated those who were responsible for Order L-208. The questions decided by the Court of Claims were simply these: *What was Order L-208 intended to do? What did it in fact do?*

An inquiry as to the purpose (or purposes) of Order L-208 is obviously proper because the Order on its face raises the issue which was stated in the petition for certiorari, i.e., whether it provides for a non-compensable regulation or a compensable taking (p. 7). Paragraph (b)(1) reads like a taking. The same thing is true of paragraphs (b)(2) and (b)(3) except perhaps for the references therein to "any material, facility, or equipment". On the other hand, the preamble, the references in paragraphs (b)(2) and (b)(3) to "any material, facility, or equipment" and the citation of authorities are mentioned in support of the view that the Order was "an allocation order". Chief Judge JONES, who concluded that the Order was an allocation order, reached that conclusion only as a result of treating (b)(1) as surplusage and misreading (b)(2) and (b)(3) (see Appendix A, p. 42). If it was necessary for the Chief Judge to go that far to reach the conclusion that the Order was an allocation order, it certainly was permissible to show, and for the Court of Claims to find as a fact, that it was not an allocation order.

It is unnecessary to make any extended argument in support of the proposition that *the use of camouflage in a preamble or elsewhere in an order which effects a taking cannot deprive the order of the character of a taking or defeat a claim for just compensation.* This Court, and the judiciary of this country generally, have consistently respected the division of powers which our Constitution commands and have been most careful to be sure that no inquiry as to the purpose of any Executive action shall result in an infringement on the prerogatives of the Executive. But the Fifth Amendment commands that if prop-

erty be taken by the Executive just compensation be paid. There is no need of argument to establish the correctness of what the Court of Claims said in denying the motion for a rehearing (R. 145), that the *Government cannot "escape the obligation of paying just compensation for what it had the authority to take and in fact took, simply by calling its action of taking a 'priorities order' or an 'allocation order'".*

VI

ORDER L-208 WAS NOT WELL ADAPTED TO MANEUVER HARD-ROCK MINERS TO THE NONFERROUS METAL MINES AND WAS A PRACTICAL FAILURE.

The petitioner's brief says that the Court of Claims held "that the issuance of L-208 in order to divert manpower to essential nonferrous mines was, in effect, ill-conceived, unwise and unsuccessful" (p. 53). That is a fair summary of the Court's Findings on this subject.

We have already quoted the ultimate Findings of the Court of Claims (see above, p. 38-39), and the subject is covered in detail at pages 68-92 of Appendix A hereto.

The WPB acted "without any justifiable anticipation that the order would bring about the transfer of more than an insignificant number of hardrock miners to the nonferrous metal mines" (Finding 51, R. 107). There was an almost incredible statistical confusion until correct statistics were finally obtained seven days before the Order was issued, and then the correct statistics were apparently disregarded (Appendix A, p. 70-73). A basic defect of L-208 as a manpower measure was that it was not "directed at the known reasons for the shortage of underground workers in the nonferrous metal mines, i.e., low wages, bad working and living conditions, and the refusal of Selective Service to defer miners" (Finding 50, R. 107). Many of the hard-rock miners were "middle-aged men with families who

owned their own homes and would not leave their communities if any alternative were possible" (Finding 50, R. 107; see also Finding 47, R. 106). Consequently they could not be "maneuvered" to distant nonferrous metal mines (see above, p. 19-20, 37-39).

When the Under Secretary of War announced the issuance of L-208 to the President of the Homestake Mining Company, which is located at Lead, South Dakota, his telegram spoke of copper and molybdenum and solicited assistance in getting the gold miners at Lead, South Dakota, to go to "the Anaconda copper mine at Butte, Montana, and the Climax Molybdenum mine at Climax, Colorado, both about 500 miles from the Homestake mine" (Appendix A, p. 32; Finding 60, R. 115). The difficulties in "maneuvering" the miners from Lead doubtless included not only the distances to Butte and Climax, but the altitude at Climax, the highest mine in North America, which is about 11,000 feet above sea level. Fifty-one Homestake employees accepted employment at Climax but 41 stayed less than six months and only 6 remained as long as one year (Finding 69, R. 115).

As to all workers referred to Climax from all of the gold mines, Dr. Wilbur A. Nelson's Report of April 30, 1943 set forth (Plaintiff's Exhibit 52, R. 545, 1352, 1353-1354):

> "The Climax Molybdenum Company had 125 workers from the gold mines, referred to them, and at present, according to Mr. Coulter of that company, have only 10 of these workers on their payroll. They had 60 workers from the gold mines come to their mine. Six of them failed to pass the physical examination, and 44 of them have since then quit working for this company."

Doubt as to the wisdom of the close down of the gold mines was expressed within the WPB before L-208 was

issued (Appendix A, p. 74-75, 78). When the Vice Chairman of WPB finally obtained the correct statistical data, he urged further study, saying that a close down "will produce very serious economic dislocations, and the total possible gain in men is a small figure" (Finding 38, R. 99).

But the die was cast. At least five times[59] between September 15 and October 6 the Army or the War Department spoke up in no uncertain terms, not to make sure that the correct facts were ascertained or that there was an analysis of the objections to the close down made within the WPB, but only to express impatience, to demand action, and finally at the October 6 meeting of the WPB to say that "failure to stop gold production immediately would be inexcusable" (see above, p. 22-26).

Actually only about 100 hardrock miners went from the gold mines to the nonferrous metal mines and remained there for more than a year (Finding 47, R. 106). The petitioner's contention, that the Finding of the Court of Claims on this point was arbitrary, is frivolous (Appendix A, p. 91).

It was no fault of the respondents that more impressive results were not obtained. The respondents did what they could to further the objective of the Order (Finding 56, R. 112; Plaintiff's Exhibit 99; R. 438, 1495, 1496-1497). The Order was a practical failure because it was "ill-conceived".

The petitioner's brief suggests that it is irrelevant "that, as an instrument for diverting manpower to nonferrous metal mines, L-208 failed of its purpose" (p. 65).

We wish to make it unmistakably clear that in our view the respondents' right to compensation is in no way de-

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[59] Finding 30, R. 93; Finding 36, R. 98; Finding 39, R. 99; Finding 40, R. 99-100; Finding 41, R. 101.

pendent upon the showing that Order L-208 failed of its labor purpose. Indeed, if the Order had succeeded in bringing about a large increase in the number of hardrock miners and a proportionate increase in the production of the needed nonferrous metals, the benefits which the Government derived from the Order would have been that much greater and its reluctance to compensate the respondents for the taking of their property might perhaps not be so great. However, we do not agree that it is immaterial that L-208 was "ill-conceived, unwise and unsuccessful".

In the first place, the evidence and the Findings completely dispose of the bold assertions in the petitioner's brief that the Order was issued "on the basis of repeated and careful studies, and after other expedients had been tried and had failed" (p. 16, 25). The *only* careful study of the situation was undertaken on October 1, 1942, seven days before the Order was issued; it showed that the number of hardrock miners in the gold mines which would be closed down was approximately 896,[60] as compared with the assertion by the representative of the WPB's Labor Division on October 1, 1942 "that there were between 10,000 and 12,000 men who were then employed in the gold mines" and the unexplained statement by the Under Secretaries of War and the Navy on October 5, 1942 that there "were two thousand to three thousand hard-rock miners engaged in gold mining". The smaller of the two figures given by the representative of the WPB's Labor Division was more than *eleven times* the correct figure. It is fantastic to assert, in the face of the record on this and many other points, that the WPB acted "on the basis of repeated and careful studies".

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[60] Of whom about 300 would be needed for standby maintenance, so that only about 600 would be available if "all could be induced to go into other mines" (Finding 37, R. 98-99). Actually, as appears from Findings 47 and 52, quoted above, only about 100 hardrock miners went into nonferrous mines and remained there for a year or more.

The petitioner is not content with its reference to "repeated and careful studies", but sponsors a broad endorsement of L-208 (p. 56):

> "Viewed, as it must, in a wartime context, there can be small room for doubt as to the necessity and justification for L-208."

Certainly the Findings of Fact of the Court of Claims dispose of the petitioner's endorsement of the Order.

Moreover, those Findings point up a feature of L-208 which should not be overlooked. *The Order represented the first and only time in the history of this country when the Executive has taken dominion and control of a business activity and closed it down in order to throw labor on the market in the hope of channelling that labor to other employment. It was a practical failure for the reason that such a method of trying to "maneuver" men was ill-conceived and unlikely to be successful.* It was particularly unlikely in the case of the hardrock gold miners because of the special factors which are referred to in the Findings of the Court of Claims. But even if those factors had not been present, the question would certainly arise as to the soundness of trying to recruit skilled employees as was done by L-208. *It cannot be doubted that the taking of the respondents' property under L-208 was a unique and regrettable episode, most unlikely ever to be repeated.*

VII

THE GOVERNMENT CANNOT ESCAPE ITS OBLIGATION TO PAY COMPENSATION ON THE GROUND THAT THERE WAS A LACK OF AUTHORITY TO TAKE THE RESPONDENTS' PROPERTY.

The petitioner's Point II is that "There was no intention, or authority, on the part of WPB to take the respondents' property or business" (p. 69-71). The dissenters below expressed views on that subject quite differ-

ent from those advanced by the petitioner. We will discuss both the arguments made by the petitioner and the views expressed by the dissenters below.

The Government raised no question as to the authority for the Order until more than 4 years after the respondents' actions were started.

It was not until after the decision of the Court of Claims in the respondents' favor on February 20, 1956 that the Government first raised, in its motion for a new trial, a question as to the authority for Order L-208.

The respondents' actions had been pending for more than four years: motions to dismiss had been denied; testimony had been taken over a period of more than four months; the Commissioner's Report had been issued; exceptions and briefs thereto had been filed; argument had been had before the Court of Claims; supplemental briefs had been filed; and the Court's decision had been handed down.

The Court below said in denying the Government's motion for a new trial (R. 145, italics in the original):

> "It should be noted that this is the *first* occasion in this lengthy litigation on which the Government has taken the position that it lacked authority to take plaintiffs' [respondents'] property. • • • It would seem that as a defense 'lack of authority to take', if there was any such lack of authority, which we think there was not, should have been raised and supported at an earlier stage."

What Mr. Justice HOLMES said for this Court in *International Paper Co.* v. *United States* (1931) 282 U. S. 399, 406, is particularly apt:

> "*The Government has urged different defenses with varying energy at different stages of the case. The latest to be pressed is that it does not appear that the action of the Secretary [of War] was au-*

thorized by Congress. We shall give scant consideration to such a repudiation of responsibility. The Secretary of War in the name of the President, with the power of the country behind him, in critical time of war, requisitioned what was needed and got it. Nobody doubts, we presume, that, if any technical defect of authority had been pointed out it would have been remedied at once. *The Government exercised its power in the interest of the country in an important matter, without difficulty, so far as appears, until the time comes to pay for what it has had. The doubt is rather late.* We shall accept as sufficient answer the reference of the petitioner to the National Defense Act * * * [39 Stat. 166, 213], giving the President in time of war power to place an obligatory order with any corporation for such product as may be required, which is of the kind usually produced by such corporation."

In the brief of the Government in *Youngstown Sheet & Tube Co.* v. *Sawyer* (1952) 343 U. S. 579, this statement by Mr. Justice HOLMES was cited as authority for the proposition that the Government could not change its position that the order in *Sawyer* was valid. The Government's brief in *Sawyer* said (p. 70-71):

"A further word should also be said as to the practical probabilities of plaintiffs' not having a remedy in the Court of Claims. Government counsel have assured them and the courts that, if an injunction is not issued, no objection will be raised to the Court of Claims' jurisdiction on the ground that the taking was invalid. *The Pewee case shows that this is not an idle promise, but established Government policy.* It is certainly not to the plaintiffs' interest to raise the point of validity in the Court of Claims. Their sole fear is that future Government counsel will make such a defense or that present counsel will change their position. But if that should happen, the courts have a ready answer in the pungent

words of Mr. Justice HOLMES in *International Paper Co.* v. *United States*, 282 U. S. 399, 406 * * *."

We will now discuss the arguments advanced in the petitioner's Point II, and also what was said in the dissenting opinions below.

A. The arguments advanced in the petitioner's Point II are plainly untenable.

The petitioner's Argument relates to (1) the asserted intent of the WPB not to take the respondents' property and (2) the extent to which the President delegated his authority to the WPB. The brief does not contain any discussion of the authority of the President, although it acknowledges that he approved L-208 (petitioner's brief, p. 21, 55).

The WPB clearly intended to do just what it did— take the respondents' property rights. The fact that it purported to act under its allocation authority is immaterial in determining the legal effect of its action.

The petitioner contends that the "WPB never had any intention to 'take' respondents' property or business for public use"; that the "WPB was acting solely under the allocation authority it possessed, by delegation from the President, under the Second War Powers Act", and that it was functioning solely in the field of "regulation, not of eminent domain"; and that the Court below "so recognized in its opinion on rehearing (R. 143)" (p. 69).

None of these contentions is sound.

The WPB certainly intended to do what in fact it did. And as we have shown, what it did amounted to a taking under the Fifth Amendment.

The petitioner's wish to avoid the constitutional effects of what the WPB did cannot change the character or consequences of its actions.

There is no finding below as to what powers the WPB thought that it was exercising when it issued L-208. The Government adduced no evidence on that subject. The record shows that in May, 1943 claims for compensation by the operators of the nonessential mines were expected. On May 24, 1943, Edward H. Rott, Deputy Administrator of L-208, wrote in a report to the Administrator (Plaintiff's Exhibit 13, R, 857, 1292, 1300):

> "The magnitude of the effect of this order is very great, with but extremely limited accomplishment. *The losses entailed by all mines through forced closing under Order L-208, promptly became potential claims for post war adjustment.* Those claims are cumulative."

The Court below did not find, and we cannot say, that Mr. Rott's memorandum of May 24, 1943 establishes that the WPB expected claims for compensation when it issued L-208. The record does not show whether or not it expected claims on the ground that the Order effected a taking. But there is no evidence that it was advised that claims on that ground could not be sustained.

The Government's brief relies on what appears on the face of L-208, particularly the preamble (petitioner's brief, p. 58-61). But the preamble was a camouflage (see above, p. 30-34, 97-98).

The argument that the WPB was acting solely under its allocation powers and functioning solely in the field of "regulation" is equally untenable. The WPB *purported* to act under its allocation authority but in fact and in law its action constituted a taking.

The petitioner's contention is reminiscent of that advanced by the Government in *United States* v. *Pewee Coal Co.* (1951) 341 U. S. 114, where the coal mines were seized

pursuant to the President's Executive Order dated May 1, 1943. The order there cited no specific statutory authority but relied generally upon the powers of the President as Chief Executive and as Commander-in-Chief. The Government contended that since the President did not purport to act under Title II of the Second War Powers Act (56 Stat. 176, 177), the "limited take-over of the coal mines for a restricted purpose" could not be deemed an exercise of the Government's eminent domain power.[61] None of the members of this Court agreed with that contention.

Nor did the Court of Claims conclude that the WPB was "functioning solely in the field of regulation", as the petitioner seems to suggest (p. 69). In its opinion on the Government's motion for a new trial, the Court below did point out that it had not held that the "WPB purported or intended to exercise any of its several requisitioning powers" and had held that the WPB purported to act

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[61] The Government's argument was as follows (brief of the Government in *United States* v. *Pewee Coal Co.*, p. 42-43):

> "Further evidence that the executive branch did not view the limited take-over of the coal mines for a restricted purpose as in the nature of a Fifth Amendment taking is the failure to rely on any federal statute implementing the eminent domain power. At the time of the 'seizure', Title II of the Second War Powers Act (56 Stat. 176, 177) was in effect, empowering the departments and agencies of the Government, upon authorization by the President, 'to acquire by condemnation, any real property, temporary use thereof, or other interest therein * * * that shall be deemed necessary, for military, naval, or other war purposes.' This statute authorized temporary takings of 'interests in realty normally purchased by private persons.' *United States* v. *Westinghouse*, 339 U. S. 261, 262. Nevertheless, the President's authorization to take possession of the coal mines nowhere invoked this or any other statute pertaining to the exercise of the Government's eminent domain power, but, rather, relied generally upon his powers 'as President of the United States and Commander-in-Chief of the Army and Navy.' (R. 10)."

under its allocation powers (R. 143). It went on to say, however (R. 145):

> "The court held that what WPB said it was doing and what it in fact and law did, were two different things and that the Government could not escape the obligation of paying just compensation for what it had the authority to take and in fact took, simply by calling its action of taking a 'priorities order' or an 'allocation order'."

The petitioner's brief does not cite the relevant statutes and in Point II of its brief no reference is made to the admitted fact that Order L-208 was issued "with the approval and at the urging of the War Department, and was approved by the President".

As to the "authority" for the taking, the petitioner's brief considers only "the allocation authority [the WPB] possessed, by delegation from the President, under the Second War Powers Act" (p. 69). The petitioner would treat as decisive the WPB's citation in Order L-208 of the authority for the Order (R. 104-105). But that citation of authority was merely one of the trappings of the Order, designed to make the Order appear as an allocation Order (see above, p. 30-34, 97-98).

It is immaterial what powers were delegated by the President to the WPB. The petitioner's brief says (p. 21):

> "L-208 was issued upon the unanimous recommendation of the War Production Board, with the approval and at the urging of the War Department, and was approved by the President."

And at page 55:

> "The decision to issue L-208 was made upon the unanimous recommendation of the WPB (R. 101) and with the approval and at the urging of the War Department (R. 99, 101). Upon its issuance, L-208 was, in effect, approved by the President (R. 107)."

Since the President approved L-208, the action of the WPB must be regarded as duly authorized unless it is established that the President had no power to authorize the taking of the respondents' property. The petitioner's brief says nothing whatever about the authority of the President.

The discussion of the statutes in the petitioner's brief is most incomplete and uninformative.

Under the heading "Statutes and Regulations Involved" at pages 3-4, the only statutory provision cited in connection with what happened in 1942 is the last sentence of Section 2(a)(2) of **Title III** of the Second War Powers Act, 56 Stat. 176, 177, which will be found at the end of Appendix C to this brief (p. 11). While that sentence from Title III of the Second War Powers Act is quoted at page 3 of the petitioner's brief, it is not discussed in the Point in the brief relating to the WPB's authority except for the naked statement at page 69 already quoted.

The petitioner's brief discusses three statutes, Section 9 of the Selective Service and Training Act of September 16, 1940, the Act of October 10, 1940 and the Act of October 16, 1941, and argues that "the particular property that respondents claim has been taken—*viz*, the right to mine gold—does not fall within the terms of these acts" (p. 70). No reference whatever is made to the other statutes which were quoted in the Appendix to the respondents' brief in opposition to certiorari, and which are quoted again in Appendix C to this brief and discussed below (p. 114-120), including particularly **Title II (not Title III)** of the Second War Powers Act.

The final paragraph in the petitioner's Argument (p. 70-71) seems to relate solely to the formal delegation of authority to the WPB, and thus the approval of the War Department and the President's approval and ratification of Order L-208 are again disregarded.

On page 70 of the petitioner's brief five cases are cited in connection with the proposition that "In absence of the legal authority to take or requisition, it is clear that the Government may not be held liable if a taking occurs." None of the cases concerned a wartime taking effected by an agency of the President, which was approved and ratified by the President. They are discussed below (p. 122-125).

B. On no theory can the Government escape its obligation to pay compensation on the ground that Order L-208 was unauthorized.

Judge LITTLETON discussed the authority for Order L-208 at length in his opinion for the Court below (R. 35-43).

Judge LARAMORE expressed the opinion "that the President lacked[62] the constitutional power and statutory authority to close these mines and, therefore, the unauthorized closing could and should have been enjoined" (R. 61).

Chief Judge JONES said (R. 60):

> "The President had neither the constitutional power nor the statutory authority to close the mines directly. It is probable that as a legal matter the enforcement of that part of the order which directed the closing of the mines could have been enjoined. However, in wartime that is not a very practical remedy because it puts any individual or company in the position of hindering the war effort."

Thus to some extent the Chief Judge agreed with Judge LARAMORE, although he thought that in wartime a suit for an injunction "is not a very practical remedy".

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[62] This word appears as "lack" in the record (R. 61). It was correctly given as "lacked" in Appendix A to the petition for certiorari (p. 50).

Statutes and Executive Orders.

Appendices C and D set forth, fully or in pertinent part, the statutes and Executive Orders which are relevant in considering the powers of the President with respect to critical materials, manpower and the taking of property, and the extent to which the President's powers had been formally delegated to the WPB by October 8, 1942.

The range of the President's powers with respect to critical materials and the taking of property of all kinds was very broad, and the Court below was correct in saying (R. 41):

> "By October 1942, Congress had conferred upon the President authority to requisition, place mandatory orders for, or take for title or for use, any real or personal property or interests therein which he deemed necessary to successfully prosecute the war. These statutes left the determination of war necessity to the absolute discretion of the President, but they required the payment of just compensation for any property taken or used. Congress also authorized the President to take possession of factories or other business establishments and to operate them if it was deemed by him to be in the interests of the national defense to do so."

The principal statutes which the Court evidently had in mind are the following:

(a) Section 120, National Defense Act of 1916, 39 Stat. 213 (Appendix C, p. 1);

(b) The Act of March 4, 1917, 39 Stat. 1192 (Appendix C, p. 2);

(c) Title II, Second War Powers Act, approved March 27, 1942, 56 Stat. 177 (Appendix C, p. 9).

Section 120 of the National Defense Act of 1916 authorized the President to place mandatory orders with a company for any product or material of the kind usually

produced or capable of being produced by such company and to take over the company's plant upon its refusal to comply with such an order (Appendix C, p. 1).[63] This statute was held to afford sufficient authority for the World War I taking involved in *International Paper Co.* v. *United States* (1931), 282 U. S. 399, 406, discussed above at pages 106-107.

The Act of March 4, 1917 authorized the President to "requisition and take over for use or operation by the Government any factory, or any part thereof" and the word "factory" was defined to include "any factory, workshop, engine works, building used for manufacture, assembling, construction, or any process, and any shipyard or dockyard" (Appendix C, p. 2). This authorized the President to "requisition and take over for use and operation by the Government" any of the respondents' installations on the surface which were required in the production of refined gold.

Title II of the Second War Powers Act authorized the "Secretary of War, the Secretary of the Navy, or *any* other officer, *board,* commission, or governmental corporation *authorized by the President" to acquire "any real property, temporary use thereof, or other interest therein, * * * that shall be deemed necessary, for military, naval, or other war purposes"* (Appendix C, p. 9). It is difficult to imagine more comprehensive language covering all manner of interests in real property.

The Court below correctly held "that L-208 by prohibiting the carrying on of otherwise lawful mining operations placed a servitude on the plaintiffs' profitable or

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[63] Section 9 of the Selective Training and Service Act of 1940, 54 Stat. 892 (Appendix C, p. 3), which is referred to in the petitioner's brief (p. 69-70), was substantially identical with Section 120, National Defense Act of 1916, except that it authorized the President to act through the head of the War Department or the head of the Navy Department. The powers under both statutes were specifically delegated to the WPB (Executive Orders Nos. 8629, 9024, 9040, Appendix D, p. 1-2, 8-9, 9-10).

beneficial use of their mines'' and that that ''amounted to a temporary taking of that property right'' (see above, p. 71-76).

L-208 and the respondents' obedience to the Order had exactly the same effect as if the respondents had granted the Government a negative easement over their mines by agreeing not to operate them so long as L-208 was in effect. What the Government got by the Order was clearly ''an interest'' in real property. Indeed, while L-208 was in effect the Government's interest in the respondents' mines was much greater than the respondents' interest in them. The Government's interest in the mines enabled it to keep them idle, except for necessary standby operations. The respondents had only the privilege of continuing, at their own expense, ''minimum maintenance to keep the mines dewatered and in standby condition'' (Finding 41, R. 101; Finding 43, R. 102-103).

When the Government acquired a servitude over the respondents' mines, it did so for a ''war purpose'' within the meaning of Title II of the Second War Powers Act. True, the purpose was not that stated in the preamble of the Order. It was, nevertheless, a war purpose, i.e., to obtain the discharge of the hardrock miners so that at least some of them could be maneuvered to the nonferrous metal mines where they would produce critical materials. The Government cannot escape liability because L-208 was not well adapted to accomplish that war purpose, or because its accomplishments were disappointing (see above, p. 103).

Title II specifically mentioned several alternative methods of taking an interest in real property: (1) purchase, (2) donation, (3) other means of transfer, and (4) condemnation (Appendix C, p. 9).

Manifestly, the statute had two objectives: *first*, to enable the Government to obtain whatever the President might consider necessary in the war effort, and, *second*, to insure that those whose property was taken (and not

donated) would receive either an agreed price for the property or judicially determined compensation.

As to the first purpose of the statute, the legislative history is clear. At 88 Cong. Rec. 1645 (February 25, 1942) Representative Hobbs, a sponsor of the statute, explained its provisions:

> "Mr. Keefe. Will the gentleman address himself to the provisions of title II, especially lines 16 and 17? I am not quite sure that I understand the gentleman's position as to exactly what that language means where it states that the Government may acquire by condemnation any real property, the temporary use thereof, or other interest therein.
>
> "What is contemplated in the event the Government seeks to condemn the temporary use of real estate or personal property or seeks to condemn some undefined, illusory other interest therein? What is meant by the language of that statute, so that we shall know what we are voting for? I confess to be ignorant on that.
>
> "Mr. Hobbs. I think the language is so strong as to make the gentleman's question one that should be answered, but I have not the time in which to do it. *I will say this, that as far as that goes, and its scope is almost unlimited, in the face of this national emergency and toward the winning of the war, we are willing for our Government to take any rights that they may need for the prosecution of this war.* If under your land there be underlying deposits of tin, the Government ought to have the right to take it. *If there be any other mineral rights, any other water rights, or any rights at all that are necessary for the winning of this war, then the Government ought to have the power to take such rights.*"

In considering the scope and effect of Title II, it is, of course, fitting to bear in mind the principle which was summarized by John W. Davis in his argument for the petitioner in *International Paper Co.* v. *United States* (1931) 282 U. S. 399, 401:

> "The extent of a statutory authorization is not to be narrowly or unnecessarily restricted, where the circumstances warrant giving to the words used a wider scope, in order fully to carry out the purpose of the legislation. This is particularly true of a wartime authorization granted to the President as commander-in-chief of the armed forces, or to an agency of the Government acting in the interests of the national defense. *Manufacturers' Land & Imp. Co.* v. *Emergency Fleet Corp.*, 264 U. S. 250, 255."

The decision cited by Mr. Davis, *Manufacturers Land & Improvement Co.* v. *United States Shipping Board Emergency Fleet Corp.* (1923) 264 U. S. 250, 255, is an apt example of the spirit evidenced by the courts in interpreting legislation relating to war powers which is "intended to be susceptible of practical application in varying situations". Pertinent decisions of lower courts are *In re Inland Waterways, Inc.* (D. C., D. Minn., Fifth Division, 1943) 49 F. Supp. 675, 677; *Brown* v. *Bernstein et al.* (D. C., M. D. Penn., 1943) 49 F. Supp. 728, 731-732; *United States* v. *Russell-Taylor, Inc.* (D. C., E. D. Mich. S. D., 1946) 64 F. Supp. 748, 752.

There being no doubt as to the President's powers under Title II of the Second War Powers Act, it is unnecessary to consider the scope of his powers as Commander-in-Chief during a war. See *United States* v. *McFarland* (C. C. A. 4, 1926) 15 F. 2d 823, 826; *Alpirn* v. *Huffman* (D. C. Neb. 1943) 49 F. Supp. 337, 340-341; *In re Inland Waterways* (D. C. Minn. 1943), 49 F. Supp. 675, 677. Cf. *Youngstown Sheet & Tube Co.* v. *Sawyer* (1952) 343 U. S. 579, 611-613.

As to the second objective of the statute, which was to insure that those whose property was taken would receive either an agreed price or judicially determined compensation, unless they donated the property,

it is true that the WPB did not follow one of the procedures prescribed by the statute. But it is the respondents, not the Government, who have a standing to complain on that account. By Order L-208 the Government was in fact able to take the respondents' property even though the WPB did not follow one of the prescribed procedures. The Government got what it wanted (see above, p. 85). Because the WPB did not follow one of the prescribed procedures, the respondents were left to recover their compensation by a suit against the Government instead of obtaining either an agreed price or just compensation fixed in a condemnation proceeding. Only the respondents can complain of that.

If the WPB, by authority of the President, had agreed with the owners of the gold mines that the mines should be shut down and that the Government should pay compensation to be calculated under an agreed formula, Title II would have been followed strictly and there could be no complaint on the part of either the Government or the respondents; there would have been a "purchase" of an interest in the mines, expressly contemplated by the statute, and both the Government and the respondents would have been properly protected. The WPB's action in taking the respondents' property without providing compensation for the respondents *at the time of the taking* cannot relieve the Government of the responsibility of paying just compensation later.

Hurley v. *Kincaid* (1932) 285 U. S. 95 establishes that the Government is liable for a taking, if one is authorized, even though it does not follow the procedure provided in the statute authorizing the taking. That was a suit by a landowner to enjoin the Government, the Secretary of War, the Chief of Engineers and the Mississippi River Commission from carrying out a flood control plan which the plaintiff claimed constituted a taking of his property. The Mississippi River Flood Control Act, enacted by Congress in 1928

(45 Stat. 534), authorized the Government agents involved to condemn property needed for the execution of the plan. The plaintiff contended, however, that the Government agents were acting illegally since they had not brought condemnation proceedings to take over his property. In denying the injunction sought by the plaintiff, this Court said (p. 104):

> "If that which has been done, or is contemplated, does constitute such a taking, the complainant can recover just compensation under the Tucker Act in an action at law as upon an implied contract, since the validity of the Act and the authority of the defendants are conceded. *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645, 658; *Great Falls Mfg. Co.* v. *Attorney General*, 124 U. S. 581, 600; *Tempel* v. *United States*, 248 U. S. 121, 129; *Marion & Rye Valley Ry. Co.* v. *United States*, 270 U. S. 280, 283. The compensation which he may obtain in such a proceeding will be the same as that which he might have been awarded had the defendants instituted the condemnation proceedings which it is contended the statute requires. Nor is it material to inquire now whether the statute does so require. For even if the defendants are acting illegally, under the Act, in threatening to proceed without first acquiring flowage rights over the complainant's lands, the illegality, on complainant's own contention, is confined to the failure to compensate him for the taking, and affords no basis for an injunction if such compensation may be procured in an action at law."

No question survives as to the formal delegation of the President's powers to the WPB, since the action of the WPB in issuing Order L-208 was approved and ratified by the President.

We have already quoted at page 111 above the acknowledgments in the petitioner's brief that Order L-208 was "approved by the President".

The WPB itself was an arm of the Executive Office of the President, established within the Office for Emergency Management (Appendix D, p. 8).

Whether or not the President knew of the decision to issue the Order at the time when that decision was made—and it seems hardly conceivable that he did not—the issuance of the Order was vigorously called to the President's attention on October 10, 1942, two days after the Order was issued, by 21 United States Senators from 12 gold-producing Western States in a detailed written protest (Finding 52, R. 107-111). The protest pointed out the many hardships the Order would entail. It emphasized the negligible benefits which the Order could be expected to achieve as a labor measure and contrasted those benefits with the injuries which the Order would impose. It drew attention to the fact that Great Britain was stimulating the production of more gold in South Africa and that the Canadian Government was doing the same thing in Canada. It concluded by saying (R. 110-111):

> "We respectfully bring this matter to your attention with the request that you stay the order made by the War Production Board affecting the gold mine operations of the United States, at least until the whole subject of marshalling of manpower and the allocation of labor may be considered, and the vital questions involved, concluded; thus that the gold mining industry of the United States may not be subjected to unwarranted and unusual hardship and injury which may not eventually be considered necessary, and which may not be equitably borne by other industries."

The President's disposition of the protest of the 21 Senators was succinctly stated by former Senator Gurney of South Dakota, who was one of the 21: they "got turned down" (R. 526).

The petitioner's brief twice acknowledges that the President's rejection of the protest constituted an approval of the Order[64] (p. 21, 55).

The cases cited by the petitioner do not support its contention that the Government can escape liability.

Hooe v. *United States* (1910) 218 U. S. 332, involved a claim by a landlord for the rental of premises which were used by the Civil Service Commission. The statute which provided for quarters for the Commission put a *specific limit* on the rental and the Congress had refused to increase the appropriation for the rental although requested to do so. The landlord knew of the limitation which had been imposed by Congress This Court pointed out that an attempt had been made to bind the Government "to pay a sum in excess of that *limited by Congress*" (p. 334).

In *United States* v. *North American Co.* (1920) 253 U. S. 330, an Army General, acting on his own authority, seized the plaintiff's property in Alaska. His action was later approved by the Secretary of War, who had the statutory authority to take the property for an Army post: The question presented which involved the statute of limitations, was when the plaintiff's claim accrued. The Court held that there was no compensable taking until the General's action was approved by the Secretary of War and that the running of the statute of limitations started at that time.

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[64] In view of the explicit acknowledgments in the petitioner's brief that the President approved L-208, it is unnecessary to consider the legal effect under Title II of the Second War Powers Act, of the showing, and the acknowledgments by the petitioner (p. 21, 55), that the Under Secretary of War, acting on behalf of the Secretary, urged that the Order be issued. However, under Title II of the Second War Powers Act the Secretary of War had the same authority as a "board • • • authorized by the President" (Appendix C, p. 9).

United States v. *Goltra* (1941) 312 U. S. 203, involved the repossession by the Chief of the Inland and Coastwise Waterways Service, on orders from the Acting Secretary of War, of some tugboats and barges which had been leased by the United States to Goltra, who sued under a special jurisdictional act. The principal question decided by this Court related to the amount of the judgment entered by the Court of Claims, which included interest. This Court held that the seizure of the tugboats and steel barges was an unauthorized tortious act and that the special jurisdictional act should not be construed as providing for interest. While the opinion in *Goltra* contains some rather broad language, *Goltra* purported to follow *Hooe* and *North American Co.*, and we do not think it can be reasonably construed as supporting a rule of immunity anything like as broad as that suggested by the petitioner.

In *Mitchell* v. *Harmony* (1851) 13 How. 115, the plaintiff, a trader and merchant, accompanied the United States Army forces in their invasion of Mexico during the Mexican War. The plaintiff tried to leave the expedition but the Army officer in charge seized the plaintiff's property and used his wagons for the transport of Army property. Subsequently the plaintiff's wagons were captured and destroyed by the enemy and the plaintiff brought a suit against the Army officer individually. At the trial in the lower Court the jury determined that the defendant officer had not acted on behalf of the United States and, thus, that he occupied the status of a trespasser. This Court said, however (p. 133):

> "There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with a particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the

> government is bound to make full compensation to the owner; but the officer is not a trespasser."

In *Youngstown Sheet & Tube Co.* v. *Sawyer* (1952), 343 U. S. 579, the Court merely said (p. 585):

> "Prior cases in this Court have cast doubt on the right to recover in the Court of Claims on account of properties unlawfully taken by government officials for public use as these properties were alleged to have been. See *e.g., Hooe* v. *United States,* 218 U. S. 322, 335-336; *United States* v. *North American Co.,* 253 U. S. 330, 333. But see *Larson* v. *Domestic & Foreign Corp.,* 337 U. S. 682, 701-702."

The President's seizure of the steel plants during a wage dispute in *Sawyer* was effected in the face of unequivocal Congressional rejection of a proposed amendment to the Labor Management Relations Act of 1947 (the Taft-Hartley Act) which would have authorized seizure as a means of settling labor disputes during an emergency (343 U. S. at p. 586, 598-602). In that respect, *Sawyer* is analagous to *Hooe,* for in both cases the taking violated limitations or prohibitions imposed by Congress expressly or by clear implication. Finally in *Sawyer,* as Mr. Justice FRANKFURTER stated in his concurring opinion, "reliance on the powers [of the President] that flow from declared war has been commendably disclaimed by the Solicitor General" (*id.* at p. 613).

Here, on the other hand, during the height of the War Order L-208 was issued with the unanimous concurrence of the WPB, an agency of the President, at the instance and with the approval of the War Department, and shortly after its issuance it was approved by the President himself. In other words, the full power of the Chief Executive and of the highest military authorities during wartime was brought to bear in order to close down the operations of a limited

number of concerns, the owners of "nonessential" gold mines. The WPB acted under color of authority, and not in defiance of any specific statutory prohibition or restriction. Under such circumstances, the Government has no standing to contend that the taking was unauthorized and that the Government is not liable for that reason.

In any event, as we have shown (p. 115-120), under Title II of the Second War Powers Act the President had ample statutory authority to take any interest in real property deemed necessary "for military, naval, other war purposes".

The Congressional waiver by the Special Jurisdictional Act of July 14, 1952 of any issue as to the authority for Order L-208.

The Special Jurisdictional Act of July 14, 1952 has been quoted at page 2 above.

We set forth at pages 130-146 below the bases for the view that the Special Jurisdictional Act constituted an acknowledgment of liability on the part of the Government to claimants who suffered losses as a result of the issuance of the Order. If this Court were to find it unnecessary (as the Court of Claims did), or should be unwilling, to adopt that view of the Special Jurisdictional Act, it would still be true that the Act was intended to, and did, waive any possible defense as to the authority for L-208. Both the wording of the Act and its legislative history support this conclusion.

The Act speaks of "the closing or curtailment or prevention of operations of [a gold mine or gold placer operation] as a result of the restrictions imposed by War Production Board Limitation Order L-208 during the effective life thereof". The Act thus expressly treats the Order as having had *an effective life*. Its wording is wholly inconsistent with the view that the respondents might be denied compensation on the ground that the Order was unauthorized.

This interpretation of the wording of the Act is fortified by the two identical Senate and House Committee Reports, discussed at pages 142-146 below, one of which is in the record as Plaintiff's Exhibit 178 (R. 855, 1559-1572). They evidence the conviction of the Committees that Order L-208 "failed completely to make any substantial contribution to the war effort and inflicted ruinous costs on the gold mining industry" (R. 1560), and that "the least that can be done is to allow those persons affected by Order L-208 their day in court for such recompense as may seem justified" (R. 1570).

Moreover, the Reports said that: "The issuance of the Order was based upon dubious if not nonexistent authority" (R. 1560). Manifestly the Committees and the Congress considered any doubt as to the authority for the Order to be an additional reason for the Court of Claims to award compensation to those whose mines were summarily shut down, not a reason against awards of compensation. There is not a word in the Committee Reports, one of which takes upon eleven pages of the record (exclusive of the Appendix to the Report), suggesting that the Committees and the Congress intended to allow the Government to question the authority for the Order. Everything in the Committee Reports indicates the contrary.

Stubbs v. *U. S.* (1937) 86 C. Cls. 152, discussed at pages 135-136 below, is in point. By the special act in that case jurisdiction was "conferred upon the Court of Claims of the United States to hear, determine and render judgment" upon the claims of the plaintiffs "for any losses and damages sustained by" the plaintiffs arising "by virtue of any acts, or actions, of any and all officers and employees of the United States in carrying out or in connection with the extension of the limits of Mount McKinley National Park after the 19th day of March, 1932". The Court held that that language eliminated any issues as to whether or not the acts of any of the officers and employees were authorized (p. 160-161).

The grounds for holding that the Act of July 14, 1952 eliminated any issue as to the authority for Order L-208 are considerably stronger than the grounds for the decision in *Stubbs* that the special act in that case precluded any objection that the actions of the Government officers were "unwarranted or unnecessary" or "in the nature of torts".

Even if specific statutory authority for the taking were not established, the respondents would be entitled to compensation under the circumstances presented in this case.

The suggestion that the respondents should have sought an injunction is unrealistic.

Judge LARAMORE's dissenting opinion below says "the President lacked the constitutional power and statutory authority to close these mines and, therefore, the unauthorized closing could and should have been enjoined", citing *Youngstown Sheet & Tube Co.* v. *Sawyer* (1952) 343 U. S. 579 (R. 61).

While Chief Judge JONES also felt that the President did not have the power or the authority "to close the mines directly," his approach to the subject was more qualified. He pointed out that "in wartime [an action for an injunction] is not a very practical remedy because it puts any individual or company in the position of hindering the war effort" (R. 60).

The conclusions reached by both dissenting Judges were based on the premise that the President did not have the power to authorize the taking of the respondents' property. We have shown that this is not the fact—that, as the Court below held, the President had the power to authorize the taking of any sort of property he deemed necessary to the war effort (see above, p. 114-120).

Moreover, we submit that whenever there is a taking in wartime by authority of the Chief Executive, under such

circumstances as were present in these cases, there should be compensation under the Fifth Amendment whether or not a post-war analysis establishes specific statutory authority for the taking. Otherwise private property can be taken with impunity without just compensation. For it is not a practical view of things to say that in wartime one whose property is taken under an order like L-208 under such circumstances can resist an agency of the Chief Executive (after an appeal made directly to the Chief Executive has been turned down) or can successfully maintain an injunction action to establish that the purpose of the order which was stated in its preamble was not its real purpose.

In a footnote to his opinion in *Hurley* v. *Kincaid*, Mr. Justice BRANDEIS said (285 U. S. at 104, Note 3):

> "Even where the remedy at law is less clear and adequate, where large public interests are concerned and the issuance of an injunction may seriously embarrass the accomplishment of important governmental ends, a court of equity acts with caution and only upon clear showing that its intervention is necessary in order to prevent an irreparable injury."

Assuming *arguendo* that the President lacked specific statutory authority to take the respondents' property by Order L-208, it is clear that the obstacles which would have confronted counsel for the respondents if they had instituted an injunction action during the War would have been insurmountable.

Such an action would have had no prospect of success unless the plaintiff was able to establish, not only that the President had no authority to take the respondents' property, but also what these respondents eventually did establish: (1) that Order L-208 was not what it purported to be, and what the Government still asserts that it was, a proper exercise by the WPB of regulatory powers

over critical materials such as was involved in *St. Regis Paper Co.* v. *United States* (1948), 110 C. Cls. 271, cert. den. 335 U. S. 815, and (2) that the Order involved a direct taking of the respondents' property in the hope that it "would bring about the transfer of more than an insignificant number of hardrock miners to the nonferrous metal mines" (R. 107).

Documents which would have been needed were classified (R. 1562).[65] The difficulties in interviewing witnesses and assembling documentary and oral evidence during wartime can be imagined. If one makes the unrealistic assumption that a well prepared action for an injunction could have been tried before L-208 was revoked on June 30, 1945, how long would have elapsed before an injunction order was entered? The history of this litigation suggests the answer.

Viewed realistically, the argument that the respondents should have sought an injunction to restrain the enforcement of Order L-208 is tantamount to saying if the President had acted without specific statutory authority in taking the respondents' property, the respondents would have been at all times without a practical remedy.

We submit that that would not be consistent with what this Court said in *Larson* v. *Domestic & Foreign Corp.* (1949), 337 U. S. 682, 704, footnote omitted:

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[65] Examples are Plaintiff's Exhibit 10 (R. 1278-1288) from which there are extensive quotations in Finding 8 (R. 66); Plaintiff's Exhibit 45 (R. 1335-1338) which is quoted in part in Finding 24 (R. 80); Plaintiff's Exhibit 87 (R. 1460) which is quoted in part in Finding 34 (R. 96-97); Plaintiff's Exhibit 25 (R. 1321) which is quoted in Finding 39 (R. 99); Plaintiff's Exhibit 26 (R. 1321-1322) which is quoted in Finding 40 (R. 99-100); and Plaintiff's Exhibit 1 (R. 1163-1254), a paragraph from which is quoted in Finding 52 (R. 111).

The originals or copies of these exhibits, as marked, show on their face that they were classified, and that in each case the classification was not cancelled until March 12, 1946 or later. Except for Plaintiff's Exhibit 1, this does not appear on the copies of the exhibits as printed.

"For, it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. . It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right. As was early recognized, 'The inference of the Courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief. . . .'

"'There are limits, of course. Under our constitutional system, certain rights are protected against governmental action and if such rights are infringed by the actions of officers of the Government, it is proper that the courts have the power to grant relief against those actions. But in the absence of a claim of constitutional limitation, the necessity of permitting the Government to carry out its functions unhampered by direct judicial intervention outweighs the possible disadvantage to the citizen in being relegated to the recovery of money damages after the event.'"

VIII

UNDER THE SPECIAL JURISDICTIONAL ACT OF JULY 14, 1952 THE GOVERNMENT IS LIABLE TO A GOLD MINE OWNER WHICH ESTABLISHES THAT IT INCURRED LOSSES BECAUSE IT WAS PREVENTED BY ORDER L-208 FROM PRODUCING AND SELLING GOLD.

In the Court of Claims the respondents contended that even if it were not established that Order L-208 effected a compensable taking, the Special Jurisdictional Act of July 14, 1952 (66 Stat. 605) conferred on the Court of Claims jurisdiction to render judgment for any losses which re-

sulted from the issuance of L-208 (R. 13).[66] The Court of Claims found that the respondents had established a compensable taking and accordingly concluded that "it is unnecessary to discuss the various contentions relative to" the Special Jurisdictional Act (R. 58).

The petitioner's brief says (p. 44, Note 29):

> "Respondents unsuccessfully urged in the Court of Claims that this Act was a mandate from Congress to the court to award compensation wherever it was proved that losses were incurred as a result of L-208."

That would seem to imply that the Court of Claims decided against the respondents as to the Special Jurisdictional Act. It did not. As already stated, the Court found that it was unnecessary to pass on the contentions of the parties relating to the Act (R. 58).

We quote again the provisions of the Act (66 Stat. 605):

> "AN ACT
>
> Granting jurisdiction to the Court of Claims to hear, determine and render judgment upon certain claims.
>
> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,
>
> That the United States Court of Claims be, and hereby is, given jurisdiction to hear, determine, and render judgment, notwithstanding any statute of limitations, laches, or lapse of time, on the claim of any owner or operator of a gold mine or gold placer operation for losses incurred allegedly because of

[66] Recovery under the Special Jurisdictional Act might be for a lesser amount than for a taking, since the claim for a taking bears interest, *Phelps* v. *United States* (1927) 274 U. S. 341, while the claim under the Special Jurisdictional Act may not. *Tillson* v. *United States* (1879) 10 Otto 43, 47; *United States* v. *Thayer-West Point Hotel Co.* (1947) 329 U. S. 585, 590.

the closing or curtailment or prevention of operations of such mine or placer operation as a result of the restrictions imposed by War Production Board Limitation Order L-208 during the effective life thereof: *Provided;* That actions on such claims shall be brought within one year from the date this Act becomes effective."

The issues presented by claims based on Order L-208, at the time when the Special Jurisdictional Act was passed.

At the time when the Act of July 14, 1952 was enacted actions were pending on several claims based on Order L-208 and it was known that there were many other owners or operators of gold mines who believed that they had claims against the Government.

All of the claims presented two issues and some of them presented a third:

First: Did the claimant suffer as a result of Order L-208?

Second: If the claimant suffered as a result of Order L-208, was there any liability on the part of the Government?

Third: Was the claim barred by the statute of limitations?

As to *First*, the Act of July 14, 1952 required a gold mine owner or operator who claimed to have suffered from Order L-208 to show that the claimant incurred losses as a result of those provisions of the Order which prevented further production from the claimant's mine. The Act did not contain an admission of liability applicable to all owners or operators of gold mines when Order L-208 was issued. For example, an owner who had shut down a mine before October 8, 1942 because of a shortage of materials or labor,[67] or which would have had to shut down in

[67] As in the case of Alabama-California Gold Mines Company, one of the plaintiffs below (R. 136).

October, 1942 even if Order L-208 had never been issued, and who could not have resumed operations before June 30, 1945 in any event, would presumably be unable to show that it had "losses incurred * * * as a result of the restrictions imposed by War Production Board Limitation Order L-208". The Act contemplated that there should be an adjudication whether Order L-208 was the competent producing cause of a loss allegedly incurred by a claimant.

As to *Third,* the Act removed the bar of the applicable statute of limitations as to any claim on which an action was brought within one year from the effective date of the Act.

There is no dispute about the effect of the Act on issues *First* and *Third.* The Act did not affect *First* and it disposed of *Third.*

As to *Second,* the respondents' contention is that by the Act a liability on the part of the Government was admitted —or created—as to each owner or operator of a gold mine which proved that it incurred a loss because it was prevented by Order L-208 from producing and selling gold.

The decisions interpreting comparable Special Jurisdictional Acts.

On several occasions it has been held that a Special Jurisdictional Act similar to that of July 14, 1952 was intended to admit, or if necessary to create, a liability on the part of the Government. In some instances the decision was based primarily on the wording of the act, in others largely on the setting in which the act was adopted and the legislative history of the act, and in others on a combination of both the language of the act and the legislative history. Before analyzing the language of the Act of July 14, 1952 and reviewing its legislative history, we will refer briefly to certain decisions which passed on questions similar to those presented in this case.

In *Creech, et al.* v. *United States* (1944) 102 C. Cls. 301, 302-303, cert. den. 325 U. S. 870, the Court had before it a Special Jurisdictional Act reading as follows:

> "That *jurisdiction is hereby conferred upon the Court of Claims of the United States to hear, determine, and render judgment* upon the claims of * * *; C. E. Thomas; * * *; R. Y. Creech; * * *; Roscoe Lee Braddock; * * *; or other persons engaged in farming on Kreamer, Torry, or Ritta Islands, in Lake Okeechobee, *for damage to or loss of crops alleged to have resulted* from the construction of levees along the Caloosahatchee River and Lake Okeechobee drainage areas in Palm Beach County, Florida, by the Corps of Engineers, War Department, and from high waters caused thereby: *Provided,* That suits hereunder shall be instituted within one year from the enactment of this Act."

The phraseology of the italicized provisions was substantially identical with the phraseology of the comparable provisions of the Act of July 14, 1952. In *Creech* the burden of the plaintiffs' contention was that a levee constructed by the Government caused wind tides to back up against the levee, thereby flooding the islands on which the plaintiffs' farms were located. In the opinion of the Court of Claims, rendered by Judge LITTLETON, it was first pointed out (p. 323) that the plaintiffs had no claim for compensation under the Fifth Amendment, because "whatever damage plaintiffs sustained as a result of the Government work was consequential and the result of authorized action of the Government".

Proceeding to a consideration of the special act, Judge LITTLETON's opinion said (p. 323):

> "* * * This act had a purpose, and its history and language indicate that such purpose was to confer jurisdiction and authority upon the court to render judgment for the amount of damage to or loss of

> crops if it should be established by proof that such damage or loss in fact and in law 'resulted from the construction of levees * * * and high waters caused thereby.' In other words, the damages which may be allowed are to be determined according to the usual principles of legal cause and legal liability. The act does not concede liability, and plaintiffs do not so contend."

The Court of Claims found that no damage suffered by the plaintiffs in *Creech* had been caused by the Government's erection of the levee and consequently no recovery was allowed. However, the Court's interpretation of the Special Jurisdictional Act involved in *Creech*, under which there would have been a recovery if damage or loss had been shown, is directly in point.

In *Stubbs* v. *United States* (1937) 86 C. Cls. 152, the Court had before it an act conferring jurisdiction to hear, determine and render judgment upon a claim "for any losses and damages sustained by Duke E. Stubbs and Elizabeth S. Stubbs in the silver fox farming and trading post business, or other business and occupation, conducted by them, or either of them, at McKinley Park, Alaska, arising out of the extension of the limits of the Mount McKinley National Park by an Act of Congress approved on the 19th day of March 1932 (47 Stat. 68), and/or by virtue of any acts, or actions, of any and all officers and employees of the United States in carrying out or in connection with the extension of the limits of Mount McKinley National Park after the 19th day of March 1932:". In interpreting the special act in that case the Court said (p. 160-161):

> "The evidence leaves no doubt that the plaintiffs sustained heavy losses and damages as a result of the extension of the limits of Mount McKinley Park which were unavoidable and also sustained very considerable loss and damage by reason of unwarranted or unnecessary acts of the defendant's officers or employees in connection with this extension.

> *Most of the acts complained of are such that ordinarily would afford no basis for a cause of action* and some of the acts, especially those of the officers or employees of the Government, were in the nature of torts, but *any objection that might arise on account of their nature is precluded by the act of Congress under which the case comes before us.*"

Other cases in which the Court of Claims construed comparable special jurisdictional acts as admitting or creating a liability are:

> *Carroll* v. *District of Columbia* (1887) 22 C. Cls. 104;
> *Radel Oyster Co.* v. *United States* (1934) 78 C. Cls. 816;
> *Edwards* v. *United States* (1934) 79 C. Cls. 436;
> *Norfolk Southern Railroad Company* v. *United States* (1942) 96 C. Cls. 357.

The decisions of the Court of Claims under the River and Harbor Act of 1935 (49 Stat. 1028, 1049; 28 U. S. C. (1946 Ed.) 250 (a)) also throw light on the proper interpretation of the Act of July 14, 1952. *Schroeder Besse Oyster Co.* v. *United States* (1942) 95 C. Cls. 729; *H. J. Lewis Oyster Co.* v. *United States* (1952) 123 C. Cls. 358. The Court there construed the following provisions of the River and Harbor Act:

> "That the Court of Claims shall have jurisdiction to hear and determine claims for damages to oyster growers upon private or leased lands or bottoms arising from dredging operations and use of other machinery and equipment in making such improvements: *Provided*, That suits shall be instituted within one year after such operations shall have terminated."

In *Schroeder Besse Oyster Co.* v. *United States* (1942) 95 C. Cls. 729, which was followed in *H. J. Lewis Oyster Co.*

v. *United States* (1952) 123 C. Cls. 358, the Court said (95 C. Cls. at p. 738):

> "Under the terms of this act the Government has not only given plaintiff the right to sue for damages but it admits its liability for all damages resulting to oyster growers from 'dredging operations and use of other machinery and equipment' for making such improvements.
>
> It is not necessary under the terms of this act to prove negligence in the operation of any instrumentality of the Government but simply to show by the preponderance of the evidence that the plaintiff was an oyster grower who was damaged as a result of dredging operations and the use of machinery and equipment in making the improvements."

The foregoing cases and others cited later show that Congress has frequently used language similar to that employed in the Act of July 14, 1952, to admit, or if necessary to create, a liability. Other Acts have not been similarly construed. The Court of Claims has generally followed the canon of construction which was announced in *Braden* v. *United States* (1880) 16 C. Cls. 389, 411:

> "* * * in each case the court will, from the language of the act, and from the nature of the case, and from the surrounding circumstances, endeavor to ascertain and carry out the legislative intent."

In this instance the language of the Act of July 14, 1952 and its legislative history are consistent with each other and establish that the Act of July 14, 1952 did not have the limited effect of merely lifting the bar of any statute of limitations but confirmed a liability of the Government to any owner or operator of a gold mine or gold placer operation which might be determined by this Court to have incurred losses as a result of Order L-208.

The language of the Act of July 14, 1952.

The intent of the Special Jurisdictional Act of July 14, 1952 is indicated by certain features of the Act:

1. It contains a grant of jurisdiction to render judgment for losses incurred.
2. It does not purport merely to remove the bar of the applicable statute of limitations.
3. It does not disclaim an admission of liability.

The Act contains a grant of jurisdiction to render judgment for losses incurred.

When the Court of Claims is not authorized to render a judgment on the basis of a prescribed showing, it is said to lack *jurisdiction* to enter such a judgment. In *St. Regis Paper Co.* v. *United States* (1948) 110 C. Cls. 271, cert. den. 335 U. S. 815, in which it was held that the plaintiff could not recover damages sustained as a result of the issuance of an Order of the WPB because the plaintiff was unable to establish that the Order resulted in a "taking" under the Fifth Amendment, the Court concluded its opinion by saying (p. 279):

> "This is a case of actual hardship. The damages are both real and substantial. But in the light of the decisions of the Supreme Court, the Tucker Act, and the established rules of law, this court does not have *jurisdiction* to grant the relief sought."

Before the enactment of the Act of July 14, 1952 the gold mine owners were required to prove a compensable taking of their property in order to bring their cases within the jurisdiction of the Court of Claims. However, the Act of July 14, 1952 conferred a *new jurisdiction* on the Court of Claims to render judgment whether or not the claimants could prove a taking compensable under the Fifth Amendment.

By the Act of July 14, 1952 the Court of Claims was

> "* * * given *jurisdiction to hear, determine, and render judgment* * * * on the claim of any owner

> or operator of a gold mine * * * for losses incurred allegedly because of the closing or curtailment or prevention of operations of such mine * * * as a result of the restrictions imposed by War Production Board Limitation Order L-208 during the effective life thereof * * *".

The grant of jurisdiction in the Act indicates that it was the intention of the Congress to require no more than a showing that the plaintiffs incurred losses as a result of the issuance of Order L-208.

If the Congress had intended to have a right of recovery depend upon a showing that there was a "taking," it would presumably have referred in the Act to a "taking".[68] The *Idaho Maryland* opinion spoke of a "taking", not of "losses incurred" as a result of the issuance of the Order; the Act of July 14, 1952 was adopted shortly after the *Idaho Maryland* opinion and the Committee Reports incorporated the *Idaho Maryland* opinion in full, as we show later in our review of the legislative history. Yet, instead of referring to a "taking", as the *Idaho Maryland* opinion did, the Congress granted the Court of Claims jurisdiction to render judgment for "losses incurred" as a result of the issuance of the Order.

The Act does not purport merely to remove the bar of the applicable statute of limitations.

If the Congress had intended merely to extend the time to file claims, it would presumably have indicated that intent in the title and also in the text. Another Act passed by the same Congress and approved on July 17, 1952—just three days after the passage of the Special Jurisdictional

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[68] Compare Private Law 1015, Ch. 934, 66 Stat. A209, quoted on the next page, where Congress authorized suits "by all persons who claim that their property, easements, rights in land, mineral interests, rights of ingress and egress, or other rights or interests were *taken* and not paid for."

Act with which we are concerned—affords an example of the type of title and text which are suitable where Congress intends only to extend time for filing certain claims (Private Law 1015, Ch. 934, 66 Stat. A209):

"AN ACT

To extend the time for filing claims on behalf of certain persons, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That notwithstanding any statute of limitations or lapse of time, suits may be instituted within one year after the enactment of this Act, in the appropriate United States district court, under the provisions of subsection (a)(2) of section 1346, title 28, United States Code, or in the United States Court of Claims, in accordance with the provisions of section 1491, title 28, United States Code, by all persons who claim that their property, easements, rights in land, mineral interests, rights of ingress and egress, or other rights or interests were taken and not paid for by, or as a result of, the construction of the Denison Dam or the impounding of the waters of Lake Texoma: *Provided,* That any such claim shall be barred forever unless suit thereon is instituted within one year from the date of enactment of this Act: *Provided further,* That nothing in this Act shall be construed to create any liability against the United States not existing prior to the enactment of this Act."

It will be noted that in the Act of July 17, 1952:

1. The title stated that the purpose of the Act was to extend the time for filing claims.

2. The Act conferred no new jurisdiction but simply provided for suits in the District Court or the Court of Claims.

3. It was provided that the recovery should depend upon whether property or other rights or interests "were taken and not paid for".

4. It was further provided specifically that the Act should not create a liability which did not exist prior to its enactment.

None of these four features will be found in the Act of July 14, 1952.

The Special Jurisdictional Act of July 14, 1952 does not disclaim an admission of liability.

A great many Special Jurisdictional Acts have been construed as creating causes of action which did not exist before the Acts were passed.[69]

It has now become the common practice, if the Congress does not intend to admit or create a liability, to include in the Act a proviso expressly so stating. For example, the 82nd Congress, which enacted the Act of July 14, 1952,

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[69] *Cross* v. *United States* (1872) 81 U. S. 479;
Roberts v. *United States* (1876) 92 U. S. 41;
Pope v. *United States* (1944) 323 U. S. 1;
Braden v. *United States* (1880) 16 C. Cls. 389;
Boudinot v. *United States* (1883) 18 C. Cls. 716;
Carroll v. *District of Columbia* (1887) 22 C. Cls. 104;
Irby v. *United States* (1922) 57 C. Cls. 60;
Southern Pacific Co. v. *United States* (1929) 68 C. Cls. 223;
Alcock v. *United States* (1932) 74 C. Cls. 308;
Radel Oyster Co. v. *United States* (1934) 78 C. Cls. 816;
Thomas C. Edwards v. *United States* (1934) 79 C. Cls. 436;
Duke E. Stubbs and Elizabeth S. Stubbs v. *United States* (1937) 86 C. Cls. 152;
Norfolk Southern Railroad Company v. *United States* (1942) 96 C. Cls. 357;
Mack Copper Co. v. *United States* (1942) 97 C. Cls. 451;
Nolan Bros. v. *United States* (1942) 98 C. Cls. 21;
Creech, et al. v. *United States* (1944) 102 C. Cls. 301; cert. den. 325 U. S. 870.

also passed eight Special Jurisdictional Acts containing a proviso disclaiming any admission of liability.[70] One of the eight was was Private Law 1015, which we have just quoted in full.

While the absence of such a proviso would not alone establish an intent to admit or create a liability, it is highly significant when considered in connection with other features of the Act of July 14, 1952 and its legislative history.

The legislative history of the Act, including the Committee Reports.

The Act was introduced as S. 3195 and favorably reported by the Senate Committee on the Judiciary on May 28, 1952 (Senate Report 1605). The bill passed the Senate without debate on June 2, 1952 (Congressional Record, Volume 98, p. 6322). It was transmitted to the House of Representatives on June 3, 1952 (Congressional Record, Volume 98, p. 6482), and favorably reported by the House Committee on the Judiciary on June 19, 1952 (House Report No. 2220). It was passed by the House without debate on July 2, 1952 (Congressional Record, Volume 98, p. 8920, 8931),[71] and approved by the President on July 14, 1952.

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[70] Private Law 488, 66 Stat. A27;
Private Law 765, 66 Stat. A118;
Private Law 778, 66 Stat. A124;
Private Law 785, 66 Stat. A127;
Private Law 826, 66 Stat. A146;
Private Law 1009, 66 Stat. A206;
Private Law 1015, 66 Stat. A209;
Private Law 1018, 66 Stat. A210.

[71] When the bill was called on the House calendar for the first time, Representative Ford had the bill placed at the foot of the calendar so that he might have "some further explanation of this legislation" (p. 8920). On the second call of the bill, Representative Ford stated "that the objection I have has been overcome" and withdrew his reservation (p. 8931). The bill then passed the House without objection.

It follows that the significant legislative history will be found in the Senate and House Committee Reports. They are identical. The Report of the Senate Committee on the Judiciary, dated May 28, 1952, is Plaintiff's Exhibit 178 (R. 855, 1559-1572).

We have quoted pertinent portions of that Report above at pages 40-42, but we refer to the Report in its entirety.

The two Reports indicate that the Committee determined that compensation should be awarded to those who could establish that they incurred losses as a result of the issuance of the Order. They do not read as if the intent of the statute was merely to remove the bar of the applicable statute of limitations.

The petitioner's brief attempts to dispose of the Act of July 14, 1952 by the bald assertion that the Act "shows on its face that it is nothing more than a Congressional waiver of the statute of limitations or the defense of laches which would otherwise be applicable" (p. 44, Note 29). The only authority cited by the petitioner for this assertion consists of two sentences from the Report of the Senate Committee, which comprises 11 printed pages of the record (R. 1559-1572).

If the Committees which sponsored the Act of July 14, 1952 had intended only to lift the bar of the applicable statute of limitations, it would have been completely adequate for them to point out that the *Oro Fino* decision, which was handed down on October 2, 1950, had been widely interpreted as making it futile to assert any claims based on Order L-208; that nevertheless some owners and operators of gold mines had actions pending before the Court of Claims; that the *Idaho Maryland* opinion of May 6, 1952 indicated that judgments for owners and operators of gold mines would be entered if they could establish "takings" that were compensable under the Fifth Amendment; and that fairness required that owners and operators

who had failed to file suits should not be prejudiced. In other words, each of the reports would have told the whole story if it had contained the preliminary paragraph (R. 1559), the short explanation of the purpose (R. 1559), and the first, third, fourth, fifth and sixth paragraphs under the heading "Statement" (R. 1559-1561). Such a Report would have taken up less than 3 pages of the record.

Instead, the Senate Committee filed a Report which takes up 11 pages of the record, exclusive of the appended copy of the *Idaho Maryland* opinion. Of the 11 pages, over 9 pages, starting with the sixth paragraph under the heading "Statement" (R. 1561), would seem out of place in the Report if the Committee had not intended that there should be compensation for losses incurred as a result of the issuance of Order L-208 even if it could not be established that there was a "taking" compensable under the Fifth Amendment.

As already stated, the House Committee's Report was identical.

By adopting the earlier Subcommittee Report from which we have quoted at pages 41-42 above, the Senate and House Committees approved of vigorous characterizations of Order L-208 and of the following conclusions quoted in the Committee Reports (R. 1562, 1570):

> "The order completely failed to accomplish its purpose, or any purpose whatever, and inflicted irreparable and unjustified loss on the gold-mining industry. Your committee believes that this order inflicted a sacrifice on the gold-mining industry which the Federal Government in common fairness should try to relieve."
>
> * * * * *
>
> "The conclusion further has been reached that the order should have provided a mechanism for compensation and that, as such was not provided, the Congress should so provide, even while realizing that much of the loss and damage is irreparable."

The pertinent part of the last paragraph of the two Committee Reports reads as follows (R. 1570):

> "The committee has carefully studied the facts relating to the situation that arose as a result of the proclamation of the War Production Board Limitation Order L-208 and is convinced that the gold mining industry was dealt with in a fashion which merits the consideration of the court in the adjudication of the losses which may have been occasioned by this order. The Idaho Maryland Mines Corp. decision is ample evidence of the fact that the least that can be done is to allow those persons affected by Order L-208 their day in court for such recompense as may seem justified."

It will be observed that in stating their respective conclusions the Senate and House Committees made no reference to the Statute of Limitations and made no reference to a "taking". The Committees said that there should be an *"adjudication of the losses which may have been occasioned by this order"*. This implied that the Committees intended the same kind of an adjudication which was called for in *Creech* v. *United States* and *Stubbs* v. *United States*, just discussed, i.e., an adjudication whether the losses were caused by Order L-208.

The Committees also said that "the least that can be done is to allow those persons affected by Order L-208 their day in court *for such recompense as may seem justified.*"

In its brief below the petitioner sought to treat the latter statement as though the two Reports had said only that "the least that can be done is to allow those persons affected by Order L-208 their day in court". The Committees' statement that those affected by Order L-208 were to be allowed "their day in court for such recompense as may seem justified" followed clear indications throughout the Reports of the Committees that recompense would be

justified if a causal connection was shown between losses and Order L-208.

The decision that judgments should be rendered for losses incurred was natural in view of the basic conclusion of the Reports that the summary shut-down of the gold mines without compensation could not be justified.

Conclusion as to the Act of July 14, 1952.

The text of the Act and the legislative history confirm that it was not intended merely to remove the bar of the applicable statute of limitations, but constituted an admission of liability for such losses as are determined to have been caused by Order L-208.

The respondents established liability on the part of the Government by proving that the issuance of Order L-208 prevented them from operating mines which they could have continued to operate but for the issuance of the Order.[72]

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[72] The following table cites the pertinent findings:

Respondent	*Findings*	*Record*
Homestake	53-63, 67, 70, 73-75	111-116
Central Eureka	76-83, 88, 89	116-120
Idaho Maryland	91-104, 107, 108	120-124
Alaska-Pacific	119-131, 135-137	127-135
Bald Mountain	138-145	135-136
Ermont	161-164, 174, 175	140

CONCLUSION

It is respectfully submitted that the judgment of the Court of Claims should be affirmed.

December 16, 1957.

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